United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

Brief for Appellant

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,350

357

Reuben H. HARRELL, Jr.,

Appellant,

v.

UNITED STATES of America,

Appellee.

Appeal from a Judgment of the United States

District Court for the District of Columbia

GEORGE W. SHADOAN
Counsel for Appellant

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STATEMENT OF QUESTIONS PRESENTED

The questions presented by this appeal are:

1. whether the lower court erred in denying appellant's motion to suppress at a hearing held July 28, 1961 when the evidence showed that the arresting narcotic officer, armed with reliable information that appellant was selling narcotics, arrested appellant unlawfully for a traffic offense and in the course of a search pursuant to the unlawful arrest discovered narcotics in appellant's taxi?

2. whether the lower court erred at the second trial in admitting evidence regarding appellant's possession of narcotics over appellant's objection when the arresting officer submitted testimony grossly inconsistent with his previous versions of the arrest; his present testimony indicating that (1) he had no information that appellant was selling narcotics on the day in question, (2) there was no arrest for a traffic violation, and (3) that the arrest took place when the officer saw narcotics in the possession of the appellant while the officer was investigating why the taxi had not moved on after two honks from the unmarked police car?

3. whether the lower court erred in denying appellant's motion for production of the arresting officer's testimony before the Grand Jury when the record disclosed, among others, the inconsistencies mentioned in questions 1 and 2, and when a particularized need was shown for the Grand Jury testimony because of the arresting officer's trial testimony was the critical link in the Government case?

4. whether the lower court erred at the second trial in denying appellant's request for an in camera inspection of the arresting officer's testimony before the Grand Jury for inconsistencies when the witness's testimony was critical to the disposition of the case and had already been shown to be inconsistent in certain respects, and when no just reason for refusing such inspection exists?

I N D E X

TABLE OF AUTHORITIES

Brief for Appellant

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,350

Reuben H. HARRELL, Jr.,

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v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from a Judgment of the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

An indictment was filed on June 19, 1961, in the United States District Court for the District of Columbia, charging appellant with violations of 26 U.S.C. 4704(a) and 21 U.S.C. 174 (J.A.). Jurisdiction was vested in the

District Court by 18 U.S.C. 3231. Upon his plea of not guilty (J.A.), appellant's first trial resulted in a hung jury on December 15, 1961. Appellant was tried a second time and found guilty of both counts on January 25, 1962. On March 9, 1962, appellant was sentenced to a term of imprisonment of twenty months to five years on count No. 1 and five years on count No. 2, the sentences on the counts to run concurrently (J.A.). Appellant's petition for leave to appeal without prepayment of costs was granted by order of this Court on September 10, 1962 (J.A.). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellant, Reuben H. Harrell, Jr., was charged in a two count indictment with violation of the federal narcotics laws, the evidence of which was that he possessed contraband narcotics on May 31, 1961 (J.A.).

THE JULY 28, 1961 PRE-TRIAL MOTION TO SUPPRESS
Government Points And Authorities:

Government filed on July 19, 1961, points and authorities in opposition to appellant's pre-trial motion to suppress. In pertinent part, that document states:

On May 31, 1961, certain officers of the Police Department received information from a source that had proven reliable in the past to the effect that the driver of General Cab No. 42 was selling narcotics in the vicinity of 7th and T Streets, N.W., in the District of Columbia. At about 8:50 P.M. that same evening, the defendant was observed by these police officers, while in their unmarked police vehicle, to be seated in General Cab No. 42, double parked, in the vicinity of the 1400 block of Belmont Street, N.W. The officers pulled up behind the defendant's cab and blew the horn twice, but the defendant did not move on. When the defendant did not move, one of the police officers got out of the unmarked vehicle, walked over to the defendant and placed the defendant under arrest for violation of our local traffic regulations. The officer then asked the defendant for his identification card and his driver's permit. The defendant at this time was observed by the officer to push something down behind the front seat. As the defendant attempted to hand his driver's permit to the officer, the officer observed a single gelatin capsule containing a white powder on the seat beside the defendant. It was at this point that the officer asked the defendant to step out of the car. When the officer reached into the car to take possession of the single gelatin capsule containing a white powder, he also observed a cigarette package on the front seat which contained fourteen additional capsules of a white powder (J.A.).

Government Testimony:

Officer Maceo Hutcherson testified in corroboration to the Government's previously filed points and authorities.

He said he had reliable information that appellant was selling narcotics on the day in question, that he pulled up behind appellant, blew his horn twice, and then got out of his cruiser and put the appellant under arrest for the traffic violation of double parking (J.A.). In answer to the prosecutor's question, "At the time you first approached the defendant, did you in fact place the defendant under arrest for a traffic violation?", Hutcherson answered, "yes, I did." (J.A.).

Upon cross-examination Hutcherson admitted that he had required the appellant to move his car (J.A.). Defense counsel asked "What did you say when you placed the man under arrest?" Hutcherson answered, "What did I say? I told him he was in violation of the traffic regulations, double parked; that I would have to take him down and give him a ticket because we didn't have our ticket book with us." (J. A.).

Hutcherson testified that he had personally received information that defendant was selling narcotics from his cab on the day in question (J.A.); that the information

had come from several sources, (J.A.); that "among others" the information had come from a police undercover agent (J. A.), and that the police undercover agent had told Hutcherson that he had seen appellant sell narcotics (J.A.). Hutcherson, with some shifting of position, testified repeatedly that he had searched the taxi only after the arrest took place (J.A.). The Government's objection was sustained to the defense questions of (1) whether the arrest was actually for the narcotic violation, (2) whether the officer in questioning the defendant had not stated that the defendant's picture had been on Captain Jefferson's desk for ten days to two weeks, and (3) why the officer had not sought a warrant (J.A.).

Hutcherson testified that his partner had approached and interrogated the ostensible passenger of the taxi because he was a known narcotic user (J.A.).

The Government, in argument, contended that the arrest took place at the precise moment that the officer approached the defendant and demanded his identification for the traffic violation (J.A.).

THE FIRST TRIAL

At the first trial, Hutcherson testified basically in accord with his pre-trial version of the events except that he no longer maintained that he had received information that the defendant was carrying narcotics that evening (J.A.). He said he was on routine narcotics duty, and it was just "happenstance" that appellant had been found with narcotics (J.A.). He no longer could remember whether he had required the taxi to be moved (J.A.), nor whether he had actually told the defendant he was under arrest for the traffic violation (J.A.), but stated that he "considered" the defendant under arrest for that violation (J.A.).

Officer Bonaparte, the partner of Hutcherson at the time of arrest, testified that he interrogated the ostensible taxi passenger, Arthur Harrison Otey, because he might be a witness to the traffic violation (J.A.).

The passenger Otey testified for the Government, and stated that he was a paying passenger; that there was no conversation at his discharge; that he merely paid his fare (J. A.).

THE SECOND TRIAL

At the second trial, Hutcherson began his direct testimony as follows:

> Q. What was your purpose in asking the defendant for his identification?
>
> A. I told him he was double parked and I was going to give him a ticket for being double parked.
>
> Q. And how were you going to accomplish this matter of giving the defendant a ticket for this violation?
>
> A. I was going to take him down to the office where we do have a ticket book. (J.A.).

At this point defense counsel began his objection to Hutcherson's testimony, indicating that the arrest for the traffic violation was unlawful since the regulations specifically allow double parking for the purpose of discharging a passenger (J.A.). A long colloquy between defense counsel and the trial judge followed in the presence of the witness (J. A.). At various points, the trial judge indicated his position that the arrest would be lawful if the officer arrested, not for a traffic violation, but because he saw narcotics while asking the defendant why he had not moved his

cab upon hearing the officer's horn (J.A.). The officer then testified that he saw the narcotic capsule before the arrest (J.A.), that he did not tell the defendant he was under arrest when asking for the defendant's identification (J.A.), that he had no information regarding narcotics violations by the defendant on the day of arrest, (J.A.), and finally that he had no intention of arresting the defendant for a traffic violation when he left the cruiser (J.A.) and that he was going to give the defendant a ticket for the traffic violation only if his identification and explanation were not satisfactory (J.A.). Hutcherson admitted that he knew a cab could lawfully double park for the purpose of discharging passengers (J.A.). Defense counsel repeated request for production and inspection of the witness' Grand Jury testimony were denied (J.A.). Similarly his request for an in camera inspection of the same was denied (J.A.).

Hutcherson again testified that his partner Bonaparte knew the passenger Otey as a narcotic violator (J.A.).

Officer Bonaparte testified that he questioned the passenger Otey because he might be a witness to the traffic violation (J.A.). He stated that he had received no tip

that the appellant was violating the narcotics laws (J.A.), and that there was no suspicion of the defendant at the time of arrest for anything other than the traffic violation of double parking (J.A.). He admitted knowledge that a taxi may lawfully double park for the purpose of discharging a passenger (J.A.).

In regard to Officer Hutcherson's direct testimony, defense counsel warned the court and prosecutor of the witness' tendency to speak of the defendant's dishonorable discharge. The court indicated its intention to declare a mistrial if that occurred, and the prosecutor indicated his confidence that no such mention would be made (J.A.). In his rebuttal testimony, Hutcherson testified as to the defendant's dishonorable discharge (J.A.).

The jury returned a verdict of guilty on both counts and the court rendered judgment sentencing appellant to five years imprisonment from which judgment this appeal is taken (J.A.).

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

> The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . . U.S. Const., amend IV.

> A person aggrieved by an unlawful search and seizure may move the . . . court for the district in which the property was seized . . . to suppress for the use as evidence anything so obtained on the ground that the property was illegally seized without warrant . . . . Fed. R. Crim. P. 41(e).

> Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed on any person except in accordance with this rule . . . . Fed. R. Crim. P. 6(e).

Rules of the Road, Traffic and Motor Vehicle Regulations for the District of Columbia:

> . . . a passenger vehicle may stop parallel and as near as practicable to parked vehicles

only long enough to actually take on or let off passengers, ... Section 76.

No person shall park a vehicle, whether occupied or not, otherwise than temporarily for the purpose of and while actually engaged in loading or unloading passengers or freight in any of the following places: Section 79(c).

On the roadway side of any vehicle stopped or parked at the edge or curb of a street. Section 79(c)3.

STATEMENT OF POINTS

Appellant intends to rely on the following points in this appeal:

1. It was reversible error for the lower court to deny appellant's motion to suppress heard on July 28, 1961, in view of the fact that purported arrest for a traffic violation was a sham to effectuate a search for the presence of suspected narcotics, and particularly in view of the fact that the arrest for the alleged traffic violation was illegal -- when the evidence was secured pursuant to this illegal police action.

2. It was reversible error for the lower court at the second trial to admit, over appellant's objection, evidence

of appellant's possession of narcotics which was so grossly inconsistent with the arresting officer's prior testimony at earlier stages indicating the arrest was for a traffic violation in conjunction with alleged reliable information that appellant was selling narcotics, and at the second trial indicating there was no such "reliable" information, that the arrest was not for the traffic violation, but was based upon the officer's observation of a felony being committed in his presence.

3. It was reversible error for the lower court to deny appellant's motion for production of the Grand Jury minutes of the arresting officer's testimony when such gross inconsistencies existed and the officer's testimony was critical to the Government case.

4. It was reversible error for the lower court to deny appellant's motion for an in camera inspection under the circumstances of need mentioned above and when no valid reason for refusal existed.

SUMMARY OF ARGUMENT

I.

Appellant's pre-trial motion to suppress evidence of

his possession of narcotics should have been granted on July 28, 1961. The Government testimony at that hearing amply demonstrated that the arrest for a purported traffic offense was in law illegal as there was no traffic offense and in law illegal because it was a sham to effectuate a search for the presence of suspected narcotics. There was no traffic violation for, as the arresting officer well knew, a taxi may double park for the purpose of discharging a passenger. The arrest was obviously a sham because the arresting officer was a narcotic detective travelling in an unmarked car without any traffic citation book, but armed with information that appellant was violating the narcotic laws. In circumstances weaker than these a sister circuit suppressed the evidence in Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961).

II.

Appellant's trial objection to the admission of the arresting officer's testimony regarding possession of narcotics was erroneously overruled because the officer's testimony was so grossly inconsistent as to be incredible as a matter of law. He began his testimony at the second trial stating that he

immediately approached appellant and told him that he was double parked and that a ticket would be given. He stated he was going to take appellant down to the station to give him a ticket. Later, after the court had indicated the arrest would be lawful if it took place after the officer observed narcotics in the possession of appellant, the officer changed his testimony saying he first approached the car with no intention of giving appellant a traffic ticket unless appellant could not produce proper identification and an explanation for not moving when the officer honked his horn. Additionally, the officer's testimony was grossly inconsistent in that he testified at the second trial that there was no information of appellant's violation of the narcotics laws on the day in question. Yet he had previously testified in great detail that he personally the same day had been told by a police undercover agent that the agent had seen appellant sell narcotics. He testified previously that he had received such information from several sources. (Appellant had no transcript of the previous testimony to use in impeachment.) In sum, the arresting officer's testimony was grossly inconsistent in regard to (a) "reliable" or otherwise information that appellant

was violating the narcotic laws, (b) when the arrest took place, (c) how the arrest took place, and (d) why the arrest took place.

III.

In view of these gross inconsistencies and the critical nature of the officer's testimony, it was reversible error to deny production of the arresting officer's testimony before the Grand Jury for use in impeachment. The Government points and authorities in opposition to the first motion to suppress heard on July 28, 1961, indicated the prospective factual testimony of the arresting officer. This memorandum was probably based upon the officer's testimony before the Grand Jury as recognized by this Court in a similar situation in Simmons v. United States, _____ U.S.App.D.C. ____(No. 16805, decided June 7, 1962). If the Grand Jury testimony was similar to the memorandum, it could have been very valuable in impeaching the officer before the Court and the jury. The testimony given by the arresting officer at the first

hearing could have served the same purpose, but was not available to the appellant.

IV.

Similarly, appellant's alternative motion for an in camera inspection of the officer's testimony before the Grand Jury should have been granted for the same reasons, and for the additional reason that such an inspection does not breach the secrecy of the grand jury proceedings and no valid reason exists for precluding such an inspection.

ARGUMENT

I.

THE LOWER COURT ERRED IN DENYING APPELLANT'S PRE-TRIAL MOTION FOR SUPPRESSION OF EVIDENCE SECURED BY AN UNLAWFUL SEARCH WHICH WAS PURSUANT TO AN ILLEGAL ARREST.

A. The Arrest Was Unlawful Because Appellant Was Lawfully Double Parked While Discharging A Passenger From His Taxi.

If the lower court had granted appellant's initial motion to suppress the evidence of his possession of narcotics in the first instance on July 28, 1961, later proceedings would have been unnecessary. Appellant contends such a ruling was demanded by the Government testimony alone.

At that hearing, the Government sought through its points and authorities, its oral argument, and its testimony to justify the search and seizure on the grounds that it was incident to a lawful arrest that took place when the officers sighted appellant double parked and immediately arrested him for that offense. As stated in the points and authorities, "When the defendant did not move, one of the police officers got out of the unmarked vehicle, walked over to the defendant and placed the defendant under arrest for violation of our local traffic regulations. The officer then asked the defendant for his identification card and his driver's permit. The defendant at this time was observed by the officer to push something down behind the front seat." (J.A.) . . . "Patently, under the circumstances heretofore delineated, the lawful arrest justified the incidental search." (J.A.). In support of these assertions the Government offered the testimony of Officer Hutcherson that he had placed the defendant under arrest for a traffic violation at the time when he first approached him (J.A.). On cross-examination, when asked what he said upon arresting appellant, the officer answered,

"I told him he was in violation of the traffic regulations, double parked; that I would have to take him down and give him a ticket because we didn't have our ticket book with us." (J. A.). The officer testified that he had required the defendant to move his vehicle before thus placing him under arrest (J.A.). Subsequent to these events, the officer testified that he saw and seized narcotics within the taxi cab of appellant (J.A.). The Government argued at the hearing that the arrest took place at the precise moment the officer approached the taxi and that the search was justified as incident to the lawful arrest for a traffic violation (J. A.).

It is clear that a search pursuant to an illegal arrest is unreasonable regardless of the evidence secured thereby. White v. United States, 106 U.S. App.D.C. 246, 271 F.2d 829(1959); United States v. Di Re, 332 U.S. 581 (1948). In this case the arrest was, contrary to the Government argument, unlawful. Sections 76, 79(c), and 79(c)3 of the Rules of the Road under the Traffic and Motor Vehicle Regulations for the District of Columbia explicitly permit the double parking of passenger

vehicles for the purpose of loading and discharging passengers. At the second trial, the officer admitted that he knew this and maintained that he had no intention of arresting appellant for double parking when he approached the car; that he intended to arrest appellant only if he did not have proper identification and could give no satisfactory explanation for not moving on when the police blew their horn (J.A.). Further the Government testimony at the first hearing clearly establishes that appellant's action in discharging his passenger was reasonably within the regulations cited. Consequently the arrest was invalid and the search and seizure unreasonable. Henry v. United States, 361 U.S. 98; United States v. Di Re, supra, Kelley v. United States, _____ U.S. App.D.C. _____ (No. 16413, decided Dec. 22, 1961).

B. The Arrest Was Unlawful Because It Was A Sham, Purportedly Based Upon A Misdemeanor Committed In The Officer's Presence, But In Fact For The Purpose Of Searching For Evidence Of The Suspected Felony.

This Court's decisions in the Kelley and White cases strongly suggest that an arrest for a misdemeanor when in fact a felony is suspected will not be upheld. Furthermore, the

case of Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961) is very nearly in point factually, and persuasive in rationale. There the police secured an arrest warrant for a minor traffic violation when they suspected the arrestee of a narcotics violation. In the process of executing the arrest warrant they observed what appeared to be marijuana in the possession of the arrestee. Hence they sought to justify the arrest on the dual ground of the warrant and the observed felony being committed in their presence. But the Court rejected both saying:

> The violation of a constitutional right by a subterfuge cannot be justified, and the circumstances of this case leave no other inference than that this is what was done with the traffic arrest warrant here. Were the use of misdemeanor arrest warrants as a pretext for searching people suspected of felonies to be permitted, a mockery would be made of the Fourt Amendment and its guarantees. (Id. at 266).

As to the attempted alternative justification of the arrest as based upon probable cause that a felony was being committed in their presence, the Court said:

> Such probable cause as did exist after appellant placed his hand to his mouth and ran was a direct product of the illegal attempt to arrest and search appellant on the traffic warrant. The police engaged in a deliberate scheme to evade

> the requirements of the Fourth Amendment by using a traffic warrant to search appellant for narcotics they suspected he had on his person. (Id. at 267).

The deliberate nature of the police purpose here is buttressed by (1) their later conflicting testimony that they had no tip that day concerning appellant's alleged narcotic violation; (2) the testimony of one officer that his partner recognized the passenger of the taxi as a narcotic violator and user while the partner later testified that he merely interrogated the passenger because he might be a witness to the traffic offense (J.A.); and (3) the conflicting stories on various occasions as to whether the arrest was for the traffic violation or not. One may perhaps take each of the various explanations of the police one by one and indicate why each is unacceptable. However, if one views all of the explanations together, the true picture emerges that no real basis for the arrest existed.

II.

THE LOWER COURT ERRED IN ADMITTING EVIDENCE RELATING TO THE POSSESSION OF NARCOTICS BECAUSE THE OFFICER'S TESTIMONY WAS SO GROSSLY INCONSISTENT AS TO BE INCREDIBLE AS A MATTER OF LAW.

If the Court should refuse to determine that the initial ruling at the July 28, 1961 hearing should have resulted in

suppression of the evidence, one must turn to the objections lodged against the admission of the evidence regarding narcotic possession at the second trial. The Court conducted an out of jury hearing to determine admissibility of the evidence. Appellant submits that the proper finding of fact should have been that the arresting officer's testimony was so grossly inconsistent as to be incredible and inadmissible as a matter of law.

The inconsistencies in this testimony have been indicated repeatedly in this brief, but most fully illustrated in appellant's Statement Of The Case. Obviously the critical matters regarding the search were (1) when the arrest took place, and (2) what authority existed for the arrest. The testimony regarding these issues was incredible in fact and in law. Even if one concedes the discrepancies are accountable to a lapse of memory, it is clear that a determination of fact should not rest upon such a memory. 1/

1/ In the recent case of Hansford v. United States, No. 16432, decided May 3, 1962, Officer Hutcherson's memory was foggy regarding whether he had made a report of an alleged sale of some 80 capsules of narcotics which he testified that he witnessed some nine months previous to the trial.

III.

THE LOWER COURT ERRED IN REFUSING PRODUCTION OF THE GRAND JURY TESTIMONY OF THE ARRESTING OFFICER AS A PARTICULARIZED NEED FOR PRODUCTION WAS SHOWN.

Since the Supreme Court decision in Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959) holding that the Grand Jury minutes should be produced for impeachment use by the defendant anytime he demonstrated a "particularized need" for them there has been one case in this jurisdiction regarding the production of such minutes. In De Binder v. United States, 110 U.S. App.D.C. 244, 292 F.2d 737 (1961) this Court held appellant's need was particularized since the testimony requested was that of a sole, key witness. This criteria is clearly present in the instant case which stands or falls with Officer Hutcherson's testimony. In the first trial the jury was unable to resolve the question of credibility beyond a reasonable doubt. In the second trial the jury may well have disbelieved Hutcherson's testimony if the defense had Grand Jury minutes of his testimony which contained the gross inconsistencies shown by his testimony at the first hearing on the motion to suppress. Since the Government's points

and authorities submitted before that hearing was likely prepared from the officer's Grand Jury testimony, 2/ the probability of useful impeaching material is very great. Thus the error can hardly be termed "harmless" despite the considerable impeachment of the officer which did take place at the second trial. Furthermore the Grand Jury testimony could not possibly be consistent with all the officer's differing versions given at the hearing on the motion and at the two trials. Logically it had to be inconsistent with one version or the other. As appellant did not have the officer's testimony at the July 28th hearing, a Grand Jury transcript similar to that testimony would have exposed to the jury inconsistencies not otherwise available, e.g., the detailed testimony regarding the "reliable" tip, and the detailed testimony of when the arrest took place, "I told him he was in violation of the traffic regulations, double parked; that I would have to take him down and give him a ticket because we didn't have our ticket book with us." (J. A.)

2/ Cf. Simmons v. United States, supra.

Thus appellant submits that the trial court should have granted the motion for production of the Grand Jury testimony of Hutcherson without considering the alternative motion for an in camera inspection. In circumstances such as these, as in De Binder, it is preferable to allow defense counsel's hostile and discerning eye to examine the Grand Jury minutes for inconsistencies rather than the impartial, and sometimes impatient, eye of the judge.

IV.

THE LOWER COURT ERRED IN REFUSING TO INSPECT IN CAMERA THE GRAND JURY TESTIMONY OF THE ARRESTING OFFICER FOR INCONSISTENCIES AS NO VALID REASON FOR REFUSAL EXISTS.

If for some reason, the Court should hold that direct production of the Grand Jury minutes of Hutcherson's testimony was not required, appellant submits that at least an in camera inspection was required. After two denials of his motion for production, appellant moved for in camera inspection (J.A.).

As recently stated so well in the Simmons case:

> We note at the outset that an in camera inspection by the trial court does not breach the secrecy of grand jury proceedings. The original testimony is not made available to the defense unless and until that inspection reveals inconsistencies. Four reasons are generally advanced

for keeping grand jury minutes secret: '(1) To prevent the accused from escaping before he is indicted and arrested or from tampering with the witnesses against him. (2) To prevent disclosure of derogatory information presented to the grand jury against an accused who had not been indicted. (3) To encourage complainants and witnesses to come before the grand jury and speak freely without fear that their testimony will be made public thereby subjecting them to possible discomfort or retaliation. (4) To encourage the grand jurors to engage in uninhibited investigation and deliberation by barring disclosure of their votes and comments during the proceedings.' 1/ None of these policies is jeopardized where, as here, the defense seeks only the inconsistent testimony of a witness who has appeared in open court and not the entire record of the grand jury proceedings. We conclude that a defense request for an in camera inspection should be granted whenever it appears that the testimony of an important prosecution witness at trial may be inconsistent with his prior testimony before the grand jury; and if such inspection reveals inconsistencies affecting credibility, his grand jury testimony should be made available to the defense. (Slip opinion at 2, 3; footnote omitted).

Surely the facts in the instant case meet the Simmons' criteria.

CONCLUSION

WHEREFORE, appellant respectfully prays that the judgment of conviction below be reversed and the case remanded for an appropriate remedy.

Respectfully submitted,

_____

George W. Shadoan
Counsel for Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17350

REUBEN H. HARRELL, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.
FRANK Q. NEBEKER,
ALFRED HANTMAN,
TIM MURPHY,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

(1) Did the trial judge rule correctly in denying a motion to suppress in a narcotics case where the testimony established that while effecting a traffic arrest a narcotics officer observed and seized narcotics in the presence of the appellant?

(2) Did the trial judge err in denying a renewed motion to suppress raised at trial?

A. Was the testimony of the police officer so inconsistent that it should have been rejected as a matter of law?

B. Was the arrest of appellant for a traffic offense a "sham arrest"?

(3) Did the trial judge err in refusing to permit appellant to inspect the grand jury minutes as well as denying an *in camera* inspection?

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TABLE OF CASES

*Cases or authorities chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17350

REUBEN H. HARRELL, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed in the District Court on June 19, 1961, appellant was charged in a two-count indictment in violation of 26 U.S.C. 4704(a) and 21 U.S.C. 174 of the narcotic laws. A plea of not guilty was entered on June 23, 1961 and counsel appointed. A pre-trial motion to suppress the narcotics seized at the time of the arrest was denied by Judge Leonard P. Walsh on July 28, 1961. A trial commencing on December 15, 1961 before Judge Burnita Shelton Matthews resulted in a hung jury. Appellant had renewed his motion to suppress before Judge Matthews and it had been denied (J.A. 16). On January 10, 1962, another motion to suppress was filed by appellant which was denied by Chief Judge Matthew F. McGuire on January 19, 1962. Appellant's second trial commencing on

January 22, 1962 before Judge Henry A. Schweinhaut ended in a verdict of guilty. Subsequently, on March 9, 1962, appellant was sentenced to from 20 months to 5 years on each count to run concurrently. This appeal followed.

Appellant initially urges upon this Court that Judge Walsh erred in denying his first motion to suppress. He further alleges that the government's testimony on the fourth hearing on the motion to suppress should be rejected because of certain inconsistencies and, finally, that the Grand Jury testimony of a government witness should have been made available to him for inspection or at least *in camera* inspection by the judge that presided over the trial which resulted in his conviction. These contentions are unsound.

The first motion to suppress

On July 28, 1961, Judge Leonard P. Walsh heard a motion to suppress on behalf of appellant. The government called as a witness Officer Maceo Hutcherson of the Narcotics Squad of the Metropolitan Police Department.

Officer Hutcherson testified that on May 31, 1961, he had received information from a reliable source that the driver of General Cab 42 was selling narcotics in the vicinity of 7th and T Streets, and also 14th and W Streets. That evening he observed this cab double parked in the 1400 block of Belmont Street, Northwest (J.A. 5). The cab remained double parked three or four minutes even after the officer had tooted the horn of his unmarked police car a couple of times for it to move on. One person was in the cab and one person was leaning on the passenger side (J.A. 6). The cab failing to move, the officer approached the driver of the cab (appellant), and asked him for his permit, registration card and hacker's face. He also told appellant he was in violation in that he was double-parked (J.A. 6), and he would have to take him downtown and give him a ticket because they did not have their ticket book with them (J.A. 8). While this was occurring, he observed appellant move around and push a cellophane paper from a cigarette package down toward the seat (J.A. 6). While appellant

was fumbling around, Officer Hutcherson observed a No. 5 capsule, the kind used in the narcotics trade. Appellant was then asked to step out of the cab and told he would be charged with the Harrison Narcotic Act (J.A. 7). The officer testified in response to a direct question that he placed appellant under arrest for a traffic violation.

Appellant also testified at the pre-trial motion to suppress before Judge Walsh. He testified that he was double parked because of the cars near the curb (Tr. Proc. of July 28, p. 7) having a parting word with his passenger (Tr. Proc. July 28, p. 3) when the officers pulled up behind him and Officer Hutcherson approached and requested his hacker's identification card, auto registration card and driving permit. He had been conversing with the passenger two or three minutes (Tr. Proc. July 28, pp. 8, 11), when the officer approached. After the officer came up to the cab it was necessary for the officer to have him move his cab "to allow traffic to pass through that block" (Tr. Proc. July 28, p. 4).

> A car was coming down the street facing me from the opposite direction. Because there were two cars there and another car had double parked on the opposite side of the street, traffic coming up behind the officer's car could not get through the block. So he asked me to move my vehicle. (Tr. Proc. July 28, p. 12).

Appellant also admitted the presence of the capsules recovered by the officer but denied having any knowledge of them. At the completion of the testimony, Judge Walsh denied appellant's motion to suppress.

The second trial

On January 22, 1962, appellant's second trial began before Judge Henry Schweinhaut. Appellant renewed his motion to suppress and the court agreed to hear the entire matter *de novo* outside the presence of the jury. The government called again as a witness Officer Hutcherson before the jury. He testified that on May 31, 1961, he was working a 6 p.m. to 2 a.m. shift with his partner, Detective Bonaparte, in an unmarked police car (J.A. 30). About 8:50

p.m., as he drove the car into Belmont Street, Northwest, he observed a General Cab No. 42 double-parked in the middle of the 1400 block. He drove up behind the cab and blew the horn a couple of times and the cab didn't pull off. Appellant was talking to a person standing outside the cab (J.A. 31). When appellant failed to move, Officer Hutcherson got out and walked up to the driver's side and asked appellant for his hacker's identification and his driver's permit. He testified he told appellant he was double-parked and he was going to give him a ticket for being double-parked (J.A. 31). At this time the jury was excused and a lengthy hearing took place. Officer Hutcherson testified that he observed a capsule before he told appellant he was under arrest (J.A. 34); asked him to step out of the cab, then he recovered the capsule and 14 others (J.A. 36). A vigorous cross-examination followed in which defense counsel sought to impeach the officer with testimony from the first trial. Great latitude was permitted by the trial judge and extensive questioning by defense counsel and the court followed. At one point, Officer Hutcherson denied certain testimony concerning when the appellant was under arrest (J.A. 46) that he had given at the first trial. Defense counsel then moved to see a copy of the Grand Jury Minutes, which was denied (J.A. 47).

The officer continued to testify concerning the events that occurred after he approached the cab. He testified he observed appellant pushing something with his left hand to his rear behind the seat. He also observed a No. 5 capsule. He then asked appellant to get out of the car and told him he was under arrest for violation of the Harrison Act (J.A. 49). The officer then observed a cellophane cigarette wrapper containing 14 capsules and called out to his fellow officer, Bonaparte.

Upon further cross-examination, he testified he had no intention of giving appellant a ticket when he approached the car, but would have done so if he did not have proper identification (J.A. 53). His testimony at a prior trial was again used in an attempt to impeach him (J.A. 54). Hutcherson testified when he observed the capsule he told appellant to get out of

the cab, he was under arrest (J.A. 55). Appellant got out the driver's side. Subsequent to this line of questioning, defense counsel moved for an *in camera* inspection of the Grand Jury minutes as well as inspection by counsel both of which were denied (J.A. 57).

The jury was then returned to the jury box and the officer testified in substance as he had testified in the out-of-court hearing (J.A. 57–66). This included an admission of appellant. "He stated he preferred not to tell me where he got the capsules from that was in the cab at that time, and he had reason for not telling me at that time he stated" (J.A. 61). Counsel did not renew his request for the Grand Jury minutes or use the prior testimony to impeach the officer.

The government called as its second witness, Officer John Bonaparte, who testified that he was with Officer Hutcherson on the night of appellant's arrest. That the police cruiser pulled up behind appellant's cab and although the horn was blown twice, the cab stayed parked (J.A. 67). After Hutcherson got out of the car, Bonaparte got out and walked up to the individual who was standing outside the cab. While he was with this person, named Otey, Hutcherson called out that he had found a capsule (J.A. 68).

The government called as a witness, William Butler, a chemist with the Internal Revenue Service who testified that the capsules found in appellant's cab contained heroin (Supplemental Transcript, pp. 60–68, 101-115). Also called was Alpheous Masters, a Police Department fingerprint expert who testified the cellophane cigarette wrapper, containing the capsules found in appellant's cab, had appellant's fingerprint on it (Supp. Tr., pp. 3–60). The government rested and a motion for a judgment of acquittal was denied.

The defense called two character witnesses and appellant himself took the stand. He testified that on the evening of May 31, 1961, he was playing pool with a Mr. Otey (Supp. Tr. 133, 144, 150) who he had played pool with many times before (Supp. Tr. 141), and had given him a free cab ride (Supp. Tr. 152) to Belmont Street. He stopped the cab to let Otey out and write down his phone number. He took down

the number because of a conversation with Otey about Otey's wife helping appellant's wife get a job in government (Supp. Tr. 133–134, 152). The cab was double parked and there was another empty car double parked on the other side of the street (Supp. Tr. 137). Appellant further testified that before he could pull away, the officer approached and asked him for his identification card and driver's permit. He testified he slid across the seat to the passenger's side, then got out of that side. He stated the officer never said anything when he approached the cab except to ask for papers. Another officer asked about his transporting narcotics, which he denied (Supp. Tr. 161). The officer asked him about a capsule on the seat (Supp. Tr. 135), then said, "If I find any more, I'm placing you under arrest." Subsequently the cab was searched and the other capsules removed. The officer also took from appellant's pocket a cigarette pack without a cellophane wrapper (Supp. Tr. 178).

Upon cross-examination, appellant admitted certain inconsistencies in his testimony from the prior trial (Supp. Tr. 141, 142, 153, 156, 157, 158, 161). He also admitted he was double parked from one to three minutes (Supp. Tr. 155) but denied the police officer mentioned any traffic violation (Supp. Tr. 160). He insisted he got out of the cab on the passenger side and the cellophane wrapper with the narcotics was between the driver and the passenger, and not on his left (Supp. Tr. 163). Appellant admitted a felony conviction for narcotic violations but denied the admissions testified to by the officers.

The final witness called in the trial was Arthur Harrison Otey, who was called as a witness by the court. Otey testified he knew appellant by sight but denied playing pool with him on the day in question (Supp. Tr. 217) or ever before. He admitted riding in appellant's cab but only as a fare-paying passenger (Supp. Tr. 223) and stated he never engaged in any conversation with appellant about his wife or gave him any telephone number (Supp. Tr. 222, 224). Otey testified the cab was parked about 30 seconds when the police car drove up (Supp. Tr. 225, 237). He could not recall whether a horn was sounded (Supp. Tr. 226).

As Otey's testimony was concluded, appellant's counsel renewed his motion to suppress and the court again denied it.[1]

REGULATIONS AND STATUTES INVOLVED

Traffic and Motor Vehicle Regulations for the District of Columbia provide:

> SEC. 76 * * * a passenger vehicle may stand parallel and as near as practicable to other parked vehicles, only long enough to take on passengers who are actually waiting at the curb or to leave off passengers. * * *
>
> SEC. 79(c) No person shall park a vehicle, whether occupied or not, otherwise than temporarily for the purpose of and while actually engaged in loading or unloading of passengers or freight in any of the following places. * * *
>
> (c)(3) On the road way side of any vehicle stopped or parked at the edge or curb of a street.

Title 40, District of Columbia Code, Section 301(c) provides:

> Any individual to whom has been issued a permit to operate a motor vehicle shall have such permit in his immediate possession at all times when operating a motor vehicle in the District and shall exhibit such permit to any police officer when demand is made thereof * * *

Title 4, District of Columbia Code, Section 140 provides:

> The several members of the police force shall have power and authority to immediately arrest, without warrant, and to take into custody any person who shall commit, or threaten or attempt to commit, in the pres-

[1] The motion was in the form of a reply to the court's cross-examination. The court acknowledged his prior ruling and ruled again the same way. It is noted that this was after hearing all the evidence including appellant's testimony (Supp. Tr. 262).

ence of such member, or within his view, any breach of the peace or offense directly prohibited by Act of Congress, or by any law or ordinance in force in the District, but such member of the police force shall immediately, and without delay, upon such arrest, convey in person such offender before the proper court, that he may be dealt with according to law.

SUMMARY OF ARGUMENT

I

The appellant's initial motion to suppress was properly denied by the trial judge. The evidence established that the officers in the process of arresting appellant for double parking in violation of a traffic regulation observed a capsule containing a narcotic on the seat beside him. The presence of the capsule plus previous information in the hands of the officer that appellant was trafficking in narcotics was a sufficient basis to arrest appellant and seize the narcotics. Whether the arrest actually occurred prior to seizing the capsule or afterwards is immaterial since probable cause existed to arrest appellant for either the traffic violation or for the observed narcotics offense.

II

The trial court did not have to reject as a matter of law the testimony of an officer just because there developed inconsistencies in his testimony. Inconsistencies go to the weight, not admissibility, of testimony.

III

There is no evidence the arrest of appellant for a traffic offense was a sham to justify a search for narcotics where the evidence established appellant violated the traffic laws and narcotics were in open view when an officer questioned him about the traffic violation.

IV

The trial judge was not required to make available to appellant the minutes of the grand jury for his inspection under the circumstances of the case. Further, the trial judge did not abuse his own discretion in not inspecting the minutes *in camera* to ferret out additional inconsistencies after certain inconsistencies had been amply demonstrated by defense counsel.

ARGUMENT

I

There was no error in the trial court's denial of appellant's first motion to suppress

Appellee takes the position that the correctness of the ruling in the initial pre-trial motion to suppress is not in issue before this Court. The issue is, was the narcotic evidence properly received in evidence in the second trial. In any event, the pre-trial motion was heard and denied. A renewal before the court at the first trial and the Chief Judge before the second trial were of no avail. When the second trial commenced, Judge Schweinhaut agreed to consider the entire matter *de novo*. The correctness of his decision, based on all the evidence, is the matter subject to review. However, since appellant raises the issue in his brief, appellee will reply because the evidence before Judge Walsh clearly established the correctness of his ruling. Judge Walsh gave the following reasons for his denial of the motion:

> "All right. The Motion to Suppress will be denied. The Court feels there are actually two factors; one is the double parking and the double parking continuing for a period of from two to three minutes. On the Movant's testimony alone it would justify an inquiry by the officer, not even related to the prior information which he had received from a reliable source, coupled with the fact that there was a capsule on the seat, and also the fact that the officer testified that in the cellophane package, in his presence, it was being pushed behind the seat.
>
> The Court therefore denied the Motion to Suppress."

From this reading it would appear that Judge Walsh judicially determined, based on the facts, that appellant's double parking was longer than necessary to actually take on or let off a passenger,[2] and the officer had probable cause to arrest for the traffic offense.

It would further appear that the Court relied on the prior information received from a reliable source, the furtive actions of appellant in pushing the narcotics behind the seat and the capsule which was before the officer's very eyes.

It was not unreasonable for Judge Walsh to construe two or three minutes an excessive amount of time to actually load or unload a passenger. Appellant admitted he had been conversing with the passenger two or three minutes, when the officer came behind him. That traffic was impeded was obvious from his own testimony, since he stated the officer required him to move his car because of the traffic situation. The officer also testified that they drove up behind appellant and honked the horn but he failed to move before they took any official action. This being true, the officer clearly had a right not only to approach and ask appellant for his permit[3] but also to arrest him for a traffic violation. The trial judge then had adequate cause to believe appellant was at that time under arrest for a traffic violation and the subsequent seizure of the narcotics was pursuant to this valid arrest. It is, of course, well settled that the police may search and seize incident to a lawful arrest.

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[2] Traffic and Motor Vehicle Regulations for the District of Columbia:

"Sec. 76 * * * a passenger vehicle may stand parallel and as near as practicable to other parked vehicles, only long enough to take on passengers who are actually waiting at the curb or to leave off passengers. * * *

"Sec. 79(c) No person shall park a vehicle, whether occupied or not, otherwise than temporarily for the purpose of and while actually engaged in loading or unloading of passengers or freight in any of the following places. * * *

"(c)(3) On the road way side of any vehicle stopped or parked at the edge or curb of a street."

[3] Title 40 D.C.C. Sec. 301(c):

"Any individual to whom has been issued a permit to operate a motor vehicle shall have such permit in his immediate possession at all times when operating a motor vehicle in the District and shall exhibit such permit to any police officer when demand is made thereof. * * *"

Harris v. *United States*, 331 U.S. 145 (1947); *Bell* v. *United States*, 102 U.S. App. D.C. 383, 254 F. 2d 82, *cert. denied*, 358 U.S. 885 (1958).

Judge Walsh also had before him the testimony of Officer Hutcherson that the driver of General Cab 42 (appellant's cab) was selling narcotics (J.A. 5). Further, he had the testimony of the officer that he observed a capsule of a type used in the narcotics trade (J.A. 6), and that appellant sought to hide a cellophane wrapper that was discovered to contain a number of capsules. This evidence could also sustain a finding of probable cause to arrest. *Bell* v. *United States, supra; Robinson* v. *United States*, 109 U.S. App. D.C. 22, 283 F. 2d 508 (1960), *cert. denied*, 364 U.S. 919; *Campbell* v. *United States*, 110, U.S. App. D.C. 109, 289 F. 2d 775 (1961).

In sum, under either theory—that is, an immediate traffic arrest or an arrest after the narcotics were observed—the arrest was valid and the denial of the motion to suppress proper.

II

The trial judge at the second trial did not err in denying the renewed motion to suppress

A. Inconsistent testimony

In his brief, appellant urges that Judge Schweinhaut at the second trial should have rejected the testimony of the Government witness as inadmissible as a matter of law. His argument does not appear to challenge that the trial judge had sufficient evidence before him at the second trial to sustain his ruling,[4] but that because of alleged inconsistencies the testimony should have been excluded as a matter of law. He cites no authority for this proposition.

It is conceded by appellee that certain inconsistencies were developed in Officer Hutcherson's testimony in the same manner that inconsistencies were revealed in appellant's testimony at the second trial. There is no showing of deliberate perjury but only the type of inconsistencies that can de-

[4]The cases cited under the first argument of this brief support the validity of the seizure.

velop in the months between arrest and trial. The showing of inconsistencies does not operate to exclude testimony. It has even been held that admitted falsehoods will not bar testimony but will only affect the weight to be given the testimony by the trier of facts. *Shelton* v. *United States*, 83 U.S. App. D.C. 257, 169 F. 2d 665, *cert. denied* 335 U.S. 834 (1948). See also *United States* v. *Aviles*, 274 F. 2d 179 (2nd Cir., 1960), *cert. denied*, 362 U.S. 974. A reading of the inconsistencies in context fails to reveal a disregard for the truth. For example:

Prosecutor:

> Q. Officer Hutcherson, I direct your attention, if I may, sir, to the night of May 31, 1961, did you on that date receive any information concerning the driver of General Cab No. 42?—A. I did, sir.
>
> Q. Will you tell us the information you received, sir?—A. I had received information, along with my partner, Officer Bonaparte, that the driver of General Cab 42 was selling narcotics in the vicinity of 7th and T Streets, and also 14th and W Streets. (Trans. of Proc. July 28, 1961; J.A. 5.)

Defense Counsel:

> Q. Listen to my question carefully: Did you, prior to the point where you approached the defendant's cab that evening, have any report to the effect that he was carrying narcotics that evening?—A. No, I did not. (Trans. of Proc. Dec. 13, 1961; J.A. 17.)
>
> Q. Had anyone, by way of an informer or something of that nature given you a tip as to anyone transporting narcotics?—A. Prior, I had information prior to this particular person, but not that particular day.
>
> Q. On that day did you receive any tip?—A. No, not on that day. (Trans. of Proc. Jan. 22, 1962; J.A. 50.)
>
> Q. Had you at any time prior to this, during the same night, May 31st, been given a tip by any informer as to someone carrying or transporting

narcotics in the neighborhood?—A. Not this particular night, no. (Trans. of Proc. Jan. 22, 1962; J.A. 61.)

An analysis of this testimony does not reveal gross inconsistencies; on three occasions the officer said he received the information on a date or time other than when the arrest occurred. The initial question directing his attention to a date in May while direct could well have been misunderstood. In any event, the inconsistencies went only to his credibility because the evidence consistently supported the validity of the officer's arrest. The inconsistencies when read in the context of the line of questioning then being developed, were not of a nature that should vitiate the entire testimony especially when the trier of facts is a judge.

B. Sham arrest

Appellant also urges that his arrest was a sham in order to search a suspected felon. This presumes, of course, that the arrest was for the traffic offense and not the felony committed in the officer's presence (possession of the narcotics). A police officer may arrest a traffic violator without a warrant.[5] The appellant was violating the traffic laws and any police officer could have arrested him.

There is no evidence that the arrest was a sham nor could appellant develop any such evidence in spite of his extensive opportunity to do so with three hearings in the subject. *Taglavore* v. *United States*, 291 F. 2d 262 (9th Cir., 1961) cited by appellant is readily distinguishable. In that case the officers did not stop the defendant when they observed him committing the traffic offenses but waited until the next day to arrest the defendant on a warrant because "[I]t was assumed that appellant (Taglavore) had marijuana

[5] Title 4 D.C.C. Sec. 140 reads as follows:

The several members of the police force shall have power and authority to immediately arrest, without warrant, and to take into custody any person who shall commit, or threaten or attempt to commit, in the presence of such member, or within his view, any breach of the peace or offense directly prohibited by Act of Congress, or by any law or ordinance in force in the District, but such member of the police force shall immediately, and without delay, upon such arrest, convey in person such offender before the proper court, that he may be dealt with according to law.

cigarettes." *Taglavore* v. *United States, supra,* at 265. The officers arrested Taglavore on the traffic warrant, then choked him until they were able to recover what he put in his mouth. The court held that Taglavore's arrest for the traffic offense, under the circumstances, was a sham.

There is no evidence of subterfuge herein or a sham arrest. Appellant would have the police overlook all lesser offenses committed by serious offenders on the theory that any arrest for something less than a serious offense was a mere sham or excuse to search. The officers need not be so limited or restricted in their duties. Appellant's real complaint is that a responsible officer enforced the law and he got caught.

III

It was not error for the trial court to refuse to inspect the Grand Jury testimony of Officer Hutcherson in camera or make it available to the defense

The appellant sought at trial to inspect the Grand Jury testimony of Officer Hutcherson or have an *in camera* inspection by the Court in support of his motion to suppress because of certain inconsistencies in the Officer's testimony. It appears from the record that appellant only sought the Grand Jury minutes in connection with his motion to suppress,* although he made a general motion renewing all prior motions at the end of his case, (Tr. 142).

It is settled that the lawfulness of a search is solely for the determination of the court and not the jury. *Simmons* v. *United States,* 92 U.S. App. D.C. 122, 206 F. 2d 427 (1953). Thus, the trial judge was the sole trier of facts on this issue. It was for him to listen to the witnesses, ob-

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*The demand occurred only during the hearing out of the presence of the jury and the record does not reflect any demand for the minutes for use in the trial on the merits (J.A. 47, 57). In fact, when Officer Hutcherson testified before the jury, appellant's counsel made no attempt to use the transcript of the first trial which he had available to show inconsistencies as he had done before the court in the out-of-court session. He apparently abandoned any attempt to discredit the officer before the jury.

serve their demeanor and from the credible testimony, make a ruling on the motion. "In our jurisprudence the credibility of witnesses and the derivation of the truth from oral testimony are reposed in the hearer of the witnesses." *Wigfall* v. *United States*, 97 U.S. App. D.C. 252, 253, 230 F. 2d 220, 221 (1956). The judge heard all the witnesses including Officer Bonapart and the appellant and consistently ruled that based on the evidence before him the motion to suppress should be denied.

At the time of the second trial, Officer Hutcherson had on two previous occasions testified concerning appellant's arrest. He had testified before Judge Walsh and at the first trial. There is no evidence on the record that appellant sought to get a copy of Officer Hutcherson's testimony at the pretrial motion. At the second trial, appellant was armed with testimony of Officer Hutcherson which he could use to impeach him. The record reflects ample use by appellant's counsel of this prior transcript in an attempt to show inconsistencies in the officer's testimony and some inconsistencies were, in fact, developed. The production of the Grand Jury minutes under the circumstances was neither necessary or required.

Appellant first urges the Grand Jury minutes should have been available for his inspection on the ground of "particularized need" because the instant case falls or stands on the sole testimony of Officer Hutcherson. This is not the case. Judge Walsh obviously relied not only on Hutcherson's testimony but also on that of appellant in denying the motion to suppress (J.A. 13). At the second trial, the court initially failed to suppress the evidence based on Officer Hutcherson's testimony but again, after all the evidence was in, reruled that the motion be denied, so the sole witness criteria of *DeBinder* v. *United States*, 110 U.S. App. D.C. 244, 292 F. 2d 737 (1961), see also *Gordan* v. *United States*, 112 U.S. App. D.C. 33, 299 F. 2d 177 (1962), is not applicable. While there may have been only a sole witness at trial before Judge Schweinhaut when he made his initial ruling, his subsequent reaffirmance of the ruling encompassed all of the testimony. Hence, there is no error in the record that warrants reversal.

Appellant urges that the Grand Jury minutes should have been inspected *in camera* by the trial judge if not made available for his own inspection. Appellee submits, under the facts of the case, the trial court did not commit reversible error in not inspecting the minutes. In *Simmons* v. *United States*, No. 16,805, decided June 7, 1962, the criteria for an *in camera* inspection was set forth as follows:

> We conclude that a defense request for an *in camera* inspection should be granted whenever it appears that the testimony of an important prosecution witness at trial may be inconsistent with his prior testimony before the Grand Jury; and if such inspection reveals inconsistencies affecting credibility, his Grand Jury testimony should be made available to the defense.

This Court went on to say, in discussing the facts of that particular case, that reversal was not required. The Court stated:

> After appellant's motion was denied, vigorous cross examination and evidence that Speed had given a different account of the crime to the police seriously impaired the value of his testimony. In addition, the prosecutor called a police officer who reported the contents of an alleged oral confession appellant made in the officer's presence. That confession confirmed the United States Attorney's opening statement and contradicted Speed's account of the crime. Under these circumstances, the material inconsistencies which might be revealed by an *in camera* inspection upon remand would be merely cumulative and hence clearly insufficient to warrant a new trial. Accordingly, the judgment below will be affirmed.

In the present case the most that could be gained by an examination of the Grand Jury minutes is some possible further inconsistencies in Officer Hutcherson's testimony. At the second trial the officer was vigorously cross examined and questioned by the court; prior inconsistencies were explored, developed and urged upon the court by appellant's

counsel. The court questioned the witnesses and even called the witness, Otey. (Supp. Tr. 214.) As noted previously, the court in its ultimate ruling on the motion to suppress had the benefit of all the testimony including Officer Hutcherson's and Bonaparte who testified about the traffic violation, and the testimony of appellant, himself,[7] as well as Otey. It is submitted that any possible material inconsistencies which might be revealed by an *in camera* inspection upon remand would be merely cumulative and insufficient to warrant a new trial. It was well to note also that the disclosure of the Grand Jury minutes is committed to the discretion of the trial judge. *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 399 (1959); *Jackson* v. *United States,* 111 U.S. App. D.C. 353, 297 F. 2d 195 (1961). It would be illogical to suggest that the trial judge abused his own discretion in not ordering the Grand Jury minutes in order to search for further inconsistencies in Officer Hutcherson's testimony after having heard the witnesses, observed their demeanor on the witness stand and having had a direct opportunity to assess their credibility.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

DAVID C. ACHESON,
United States Attorney.
FRANK Q. NEBEKER,
ALFRED HANTMAN,
TIM MURPHY,
Assistant United States Attorneys.

[7] The trial court also had a copy of Harrell's testimony at his first trial (Supp. Tr. 198).

U.S. GOVERNMENT PRINTING OFFICE [illegible]

19

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,350

REUBEN H. HARRELL, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEX

JOINT APPENDIX

[Filed June 19, 1961]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled on April 27, 1961, Sworn in on May 2, 1961.

THE UNITED STATES OF AMERICA	Criminal No. 483-61
	Grand Jury No. 642-61
v.	Violation: 26 U.S.C. 4704(a) 21 U.S.C. 174
REUBEN H. HARRELL, JR.	(Possession of narcotics; facilitation of concealment and sale of narcotics, knowing same to have been imported contrary to law)

The Grand Jury charges:

On or about May 31, 1961, within the District of Columbia, Reuben H. Harrell, Jr. purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, fifteen capsules containing a mixture totaling about 745 milligrams of heroin hydrochloride and milk sugar.

SECOND COUNT:

On or about May 31, 1961, within the District of Columbia, Reuben H. Harrell, Jr. facilitated the concealment and sale of a narcotic drug, that is, fifteen capsules containing a mixture totaling about 745 milligrams of heroin hydrochloride and milk sugar, after said heroin hydrochloride had been imported, with the knowledge of Reuben H. Harrell, Jr., into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the first count of this indictment.

/s/ DAVID C. ACHESON
Attorney of the United States in
and for the District of Columbia

A TRUE BILL: * * *

[Filed June 23, 1961]

PLEA OF DEFENDANT

On this 23rd day of June, 1961, the defendant Reuben H. Harrell, Jr., appearing in proper person and without counsel, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

The defendant is remanded to the District Jail.

By direction of
JOHN J. SIRICA
Presiding Judge
Criminal Court #1

* * * * * *

[Filed July 19, 1961]

POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO SUPPRESS

The defendant's arrest and subsequent search did not violate the defendant's Fourth Amendment rights

On May 31, 1961, certain officers of the Police Department received information from a source that has proven reliable in the past to the effect that the driver of General Cab No. 42 was selling narcotics in the vicinity of 7th and T Streets, N.W., in the District of Columbia. At about 8:50 P.M., that same evening, the defendant was observed by these police officers, while in their unmarked police vehicle, to be seated in General Cab No. 42, double parked, in the vicinity of the 1400 block of Belmont Street, N.W. The officers pulled up behind the defendant's cab and blew the horn twice, but the defendant did not move on. When the defendant did not move, one of the police officers got out of the unmarked vehicle, walked over to the defendant and placed the defendant under arrest for violation of our local traffic regulations. The officer

then asked the defendant for his identification card and his driver's permit. The defendant at this time was observed by the officer to push something down behind the front seat. As the defendant attempted to hand his driver's permit to the officer, the officer observed a single gelatin capsule containing a white powder on the seat beside the defendant. It was at this point that the officer asked the defendant to step out of the car. When the officer reached into the car to take possession of the single capsule containing a white powder, he also observed a cigarette package on the front seat which contained fourteen additional capsules of a white powder. When the preliminary field test disclosed the actual existence of a narcotic substance, the defendant was actually booked for violations of the Federal narcotic laws rather than on the traffic charge. Under our local regulations the officers were empowered to ask the taxi driver for his identification and license. Patently, under the circumstances heretofore delineated, the lawful arrest justified the incidental search. Harvey v. United States, 90 App. D.C. 167.

Even if it be argued that the defendant was not placed under arrest at the time of the aforesaid traffic violation, still with the officer armed with the information from a previously reliable source to the effect that narcotics were being sold by General Cab No. 42, together with his observation of the defendant pushing something down behind the front seat, and also observing the single gelatin capsule containing a white powder alongside the defendant, the officer certainly had probable cause to believe that at the time the defendant was violating the Federal narcotic laws, and therefore was empowered to promptly place the defendant under arrest.

The test by which the propriety of arrests without a warrant is to be judged has been defined with great particularity in Brinegar v. United States, 338 U.S. 160. The Supreme Court pointed out that the standard of proof required for probable cause is far less stringent than that required to establish guilt; that nothing more is required to justify an arrest than that the circumstances known to the officer by personal observation

or by information be such as would justify a man of reasonable caution in the belief that an offense had been committed; that the existence of probable cause must be determined in all cases "by an act of judgment formed in the light of the particular situation and with account taken of all the circumstances." See also United States v. Rabinowitz, 339 U.S. 56.

For the foregoing reasons, and for such other reasons as may be urged at the time of argument, the defendant's motion to suppress should be denied.

/s/ DAVID C. ACHESON
United States Attorney.

/s/ ALFRED L. HANTMAN
Assistant U. S. Attorney

[Certificate of Service: Dated July 19, 1961]

[Filed May 7, 1962]

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS ON MOTION TO SUPPRESS

1

Washington, D. C.
July 28, 1961.

The above-entitled cause came on for hearing before HON. LEONARD P. WALSH, Judge, on a Motion to Suppress, at 10:00 o'clock A.M., July 28, 1961.

* * * * *

13 Whereupon:

MACEO HUTCHERSON

was called as a witness for and on behalf of the Government, and first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HANTMAN:

Q. Give me your full name and assignment, please. A. Maceo

Hutcherson, assigned to the Narcotic Squad, Metropolitan Police Department.

Q. You are a police officer? A. I am.

Q. How long have you been on the Metropolitan Police Department? A. Three years.

Q. How long have you been on the Narcotics Squad? A. Three years.

Q. Officer Hutcherson, I direct your attention, if I may, sir, to the night of May 31st, 1961, did you on that date receive any information concerning the driver of General Cab Number 42? A. I did, sir.

14 Q. Will you tell us the information you received, sir? A. I had received information, along with my partner, Officer Bonaparte, that the driver of General Cab 42 was selling narcotics in the vicinity of 7th and T Streets, and also 14th and N Streets.

Q. Was this information that you had received from a reliable source, sir? A. It was, sir.

Q. Did you have occasion, Officer Hutcherson, on this particular night, to see General Cab Number 42? A. I did, sir.

Q. And when and where was that? A. I saw General Cab Number 42 double parked in the fourteen hundred block of Belmont Street, northwest.

Q. How long did you observe this car to be double parked in the vicinity of the fourteen hundred block of Belmont Street? A. It was double parked there when I first pulled in the entrance on Belmont Street. Then I pulled up behind it and sat there for about three or four minutes, and he was still sitting there, double parked, after I had tooted the horn a couple of times.

Q. How many times did you toot the horn? A. A couple of times.

15 Q. Was anyone with you at the time? A. Officer Bonaparte was with me.

Q. Where was he sitting? A. On the passenger side he was sitting.

Q. Could you observe the number of individuals that were inside

or in the vicinity of General Cab Number 42? A. There was one individual standing outside the cab, talking, leaning on the door.

Q. On the driver's side or the passenger's? A. The passenger's side.

Q. How many individuals did you observe inside the cab? A. There was only one individual inside the cab.

Q. Who was that? A. That was the driver.

Q. Now, when you blew the horn a few times, what was your purpose of blowing the horn? A. For the individual to move on.

Q. Did the driver of General Cab Number 42 move on in response to the blowing of your horn? A. No, he did not.

Q. As a result of this what, if anything, did you then do, as a

16 result of his inaction? A. I then parked behind him, got out of the cruiser and walked up to the cab and told him he was in violation and that he was double parked.

Q. Did you ask him for anything at that time? A. At that time I asked him for his permit, registration card, and his hacker's face.

Q. All right. A. At the time I asked him for this he began to move around and push something down toward the seat.

Q. What was it you saw him push down toward the back of the front seat? A. It was cellophane paper off of a cigarette package.

Q. Did you notice anything else at that time? A. At this time he fumbled around for a while and he said he could not find the hacker's face, then I observed that white capsule.

Q. Where did you observe this white capsule? A. Laying on the seat beside him, where he was sitting.

Q. Did the capsule contain anything? A. It did. It contained a white powder.

Q. What was the size of the capsule? Could you observe that?

17 Q. It was a number five capsule, which is fairly well known in the narcotics trade.

Q. This is smaller or larger than a medicinal capsule, generally? A. It is smaller.

Q. And you could observe this? A. I could.

Q. As a result of seeing this number five capsule containing a white powder and also observing the defendant attempting to push a cigarette package or cellophane wrapper, behind the front seat, what, if anything, did you do? A. I then asked him to get out of the cab and I took the capsule, and I told him he was going to be charged with violation of the Harrison Narcotic Act, after I had taken the other cellophane paper out which contained fourteen capsules.

Q. Was there a cigarette package or just the cellophane wrapper? A. It was just the covering of the cigarette package. He had the cigarettes in his pocket, and the cellophane which covered the package was what he had the capsules in.

Q. What kind? A. A Salem package of cigarettes. He had it in his shirt pocket.

18 Q. And the cellophane was removed? A. The cellophane was removed.

Q. Now, when you took the defendant to headquarters what did you actually -- strike that, please.

I assume you did take him to the precinct or headquarters, is that correct? A. I did, directly to the precinct, the Narcotics Squad.

Q. What, if anything, did you charge him with? A. I charged him with violation of the Harrison Narcotic Act, after testing the capsules, and I found it was of positive reaction.

Q. Now, at the time you were on the street initially, do you customarily carry your book of traffic tickets with you to give out to motorist? A. No, we do not.

Q. Can you tell His Honor why you did not charge the defendant in this case with a traffic violation? A. Normally in the police department, when there is a misdemeanor violation, and also a felony, the police department usually charges with the felony rather than the misdemeanor.

Q. At the time you first approached the defendant, did you, in fact,

place the defendant under arrest for a traffic violation? A. Yes, I did.

MR. HANTMAN: That is all the Government has, Your Honor.

CROSS EXAMINATION

BY MR. O'DONNEL:

Q. Officer Hutcherson, when you approached the defendant's car, was he seated in the driver's seat at that time? A. He was.

Q. And you asked him for his credentials? A. I did, sir.

Q. From the time you asked him for his credentials until the time that he went to the precinct with you, did there ever come a time when the vehicle was moved in your presence? A. I did have him move the vehicle, after traffic began to pile up in the back and in the front. I had him move the vehicle up about five feet.

Q. Was he under arrest at the time he moved the vehicle? A. I believe I had told him that he was in violation of double parking at the time, yes, sir.

Q. You misunderstand my question. I asked was he under arrest at the time he moved the vehicle? A. That was before I believe I placed him under arrest.

Q. What other officers were with you? A. Officer Bonaparte, my partner.

Q. He was the only other officer with you? A. There was another officer in the car, but he never got out of the car.

Q. What did you say when you placed the man under arrest? A. What did I say? I told him he was in violation of the traffic regulations, double parked; that I would have to take him down and give him a ticket because we didn't have our ticket book with us.

Q. Are you prepared to state that neither of the other two officers in that car had traffic books with them? A. Yes, I am.

Q. You stated on direct examination that you had information from a reliable source that the defendant was selling narcotics. Do you know that source? A. Do I know the source?

Q. Yes. A. Yes, I do.

Q. How did you get this information? A. From the time I have
21 been working with it, I have various sources of information that I receive information from.

Q. Have you ever personally observed the defendant selling narcotics? A. I have never personally observed him selling narcotics; but I have personally observed the defendant in the vicinity where the traffic of narcotics are being sold.

Q. You have observed lots of other people, citizens of the community, in the same vicinity, is that not so? A. I would not necessarily say other people. I have seen narcotic users in that vicinity.

Q. And nobody except narcotic users? A. I would not say that I have noticed too many other people other than the narcotic users.

Q. Did your information come from a paid informer? A. I would not say it was a paid informer, no.

Q. Did your information come from a salaried employee of the Metropolitan Police Department?

MR. HANTMAN: I will object. It is not material to the resolution of this motion, the source of the information is not part of this instant motion. It is sufficient for the counsel and the Court to have the testimony of this witness, and it is information he received from a previous
22 reliable source.

MR. O'DONNELL: I recognize the basis of the objection, and yet if the Court were to preclude exploration of this type of testimony, defendants in all cases would be confronted with complete inability to assail the assertion that the source is in fact reliable.

THE COURT: The Court understands what you want to do is make inquiry further, without any disclosure?

MR. O'DONNELL: I want to shed light for the benefit of the Court and the defendant on the question of whether or not the source is reliable.

THE COURT: Is reliable?

MR. O'DONNELL: Yes.

THE COURT: You may proceed along those lines, on the "reliable"

angle. The Court rules the "reliable" angle is material and consequently, you may proceed.

BY MR. O'DONNELL:

Q. Did the information that the defendant sold narcotics come to you from a salaried employee of the Metropolitan Police Department? A. Well, I had information from more than one individual. But, to answer your question, there was an undercover officer of the Police Department who had been out in the vicinity working, and also who had

23 given information that he had seen this defendant sell narcotics.

Q. Are you prepared to state that this undercover man -- did he give the information to you? A. Along with others, he did.

Q. But he gave it to you? A. That is correct.

Q. You spoke with him? A. I did.

Q. And did he tell you that he had seen this man in the vicinity of places where narcotics were sold? A. Yes, he did.

Q. Did he, in fact, tell you that he had seen this man sell narcotics? A. He did.

Q. To your knowledge, has any traffic charge been placed against this man in connection with this incident? A. No, it has not.

Q. Who conducted the search of the vehicle? A. There wasn't a search. I just took the cellophane paper out of the front seat when he tried to push it in.

Q. Did this take place before or after the vehicle was moved?

24 A. It was before the vehicle was moved.

Q. Before the vehicle was moved, at a time when the man was not under arrest, is that correct? A. The question wasn't clear. When you said before the vehicle was moved, I was thinking you meant before it was brought to headquarters.

Q. No, I meant before it was moved at all? A. It was done after he was placed under arrest.

Q. Well, then, I will go back to the question; was the search of the vehicle made before the defendant moved it from the spot it was in when you first observed it in the fourteen hundred block of Belmont Street,

or after he had pulled it up at the request of police officials? A. Would you repeat the question again, please, sir?

MR. O'DONNELL: Would the reporter please read it back.

(Whereupon the reporter read the last pending question.)

THE WITNESS: It wasn't a search, as I say, but I took the paper out of the seat after he had pulled it up. That was after he had been placed under arrest.

BY MR. O'DONNELL:

Q. Well, you were at the scene observing this vehicle not for the purposes of enforcing traffic regulations but to make an arrest for nar-
25 cotic purposes; is that so?

MR. HANTMAN: Objection. It is argumentative.

THE COURT: Objection sustained.

BY MR. O'DONNELL:

Q. You have indicated, Officer Hutcherson, that Officer Bonaparte talked with the passenger who had left the vehicle? A. Yes, he talked with the passenger who had left the vehicle.

Q. In your presence? A. Not in my presence, no.

Q. By a pre-arranged plan made in the car before he got out of the car? A. No, sir, Officer Bonaparte recognized the passenger had been a narcotic user. As we approached the car, the individual standing on the passenger's side began to walk away.

MR. O'DONNELL: Will the Court indulge me just a moment?

THE COURT: Certainly.

BY MR. O'DONNELL:

Q. After you took the defendant to the police headquarters, did you have a conversation with him there? A. I did.

26 Q. Did you tell him that Captain Jefferson had his picture on his desk for approximately ten days or two weeks prior to this time?

MR. HANTMAN: I object. This testimony goes beyond the scope of the Motion.

THE COURT: Do you agree?

MR. O'DONNELL: I don't think it goes beyond the scope.

THE COURT: The objection will be sustained.

BY MR. O'DONNELL:

Q. Can you give us any reason why a warrant was not procured against the defendant in this case?

MR. HANTMAN: Objection. It calls for a conclusion by the witness.

THE COURT: The objection will be sustained.

MR. O'DONNELL: I have no further questions.

MR. HANTMAN: No questions.

THE COURT: You may step down.

* * * * *

31 MR. HANTMAN: If Your Honor please, it is the Government's position as stated in its opposition that this search was incident to a lawful arrest for a traffic violation by this defendant. I think that position is borne out by the testimony adduced here this morning, contrary to the position taken by my good friend, Jim O'Donnell. It is a violation of the traffic laws even if you are sitting in your car and sitting double parked on the streets of the District of Columbia. It makes no difference whether you are in the car or out of the car.

Here you have testimony by the defendant himself that he was talking to his passenger-friend for two or three minutes. Now the officers coming up in their unmarked vehicle, blew the horn two or three times and the defendant doesn't move on. I think at that time, when the officer got out of his vehicle, walked up to the cab driver and asked for his identification, it was at that distinct moment that the defendant was under arrest.

Now, Mr. O'Donnell complains that no words were spoken to the

32 defendant relative to his being placed under arrest. I submit no magic formula is necessary or may be applied when a person is taken into custody or restrained of his full liberty. In Mortin versus the United States, 79 US Apps. D.C. 329, at the very moment when the officer asked the man for his driver's license for what he observed to be a traffic violation, that man was under arrest.

When he says by his own testimony, "We pulled him over to the curb; we told him he was double parked," he was then under arrest, with

this officer then being armed with his previous reliable information to the effect that the driver of the cab had been selling narcotics in the vicinity of 7th and T Streets, Northwest, and when he sees this number five capsule, which he knows from his prior experience is a smaller sized capsule than a medicine capsule, containing the white powder, and in addition to that he sees the defendant trying to push some cellophane wrapping down behind the front seat, I submit even without arrest there was more than ample cause to place the defendant under arrest and take possession of this property.

Under all of the circumstances in this case, I submit that the Motion to Suppress should be denied, Your Honor.

* * * * *

33

MR. O'DONNELL: I think we have had a full hearing on the Motion to Suppress.

THE COURT: All right. The Motion to Suppress will be denied. The Court feels there is actually two factors; one is the double parking and the double parking continuing for a period of from two to three minutes. On the Movant's testimony alone it would justify an inquiry by the officer, not even related to the prior information which he had received from a reliable source, coupled with the fact that there was a capsule on the seat, and also the fact that the officer testified that in the cellophane package, in his presence, it was being pushed behind the seat.

The Court therefore denies the Motion to Suppress.

* * * * *

[Filed July 28, 1961]

DENIAL OF DEFENDANT'S MOTION TO SUPPRESS

On this 28th day of July, 1961 came the attorney for the United States; the defendant in proper person and by his attorney, J. F. O'Donnell, Esq.; whereupon the defendant's motion to suppress evidence and motion for a bill of particulars come on to be heard and are argued by counsel. The motion to suppress evidence is by the Court denied and the motion for a bill of particulars is withdrawn in part by counsel for the defendant, and is granted in part and denied in part by the Court.

By Direction of

/s/ LEONARD B. WALSH
Presiding Judge

* * *

[Filed October 17, 1962]

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

Hon. Burnita Shelton Matthews,
United States District Judge

Washington, D.C.
December 13, 1961

* * * * *

MACEO HUTCHERSON

called as a witness by the Government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HANTMAN:

* * * * *

Q. Officer Hutcherson, directing your attention to the evening of May 31st of this year, do you recall what sort of work you were doing or what assignment you had on that evening? A. I was working the tour of duty from 6 p.m. to 2 a.m. in the Narcotics Squad.

Q. Did you have a vehicle at your disposal? A. I was driving a cruiser, a plain car cruiser, for the Metropolitan Police Department.

Q. You mean an unmarked vehicle? A. That is correct.

Q. Did you have an associate with you that evening? A. Detective John Bonaparte, my partner, was with me.

Q. About 8:50 p.m. that evening, do you recall where you were on that date? A. I was cruising in the vicinity of 14th and Belmont Streets, N.W., Washington.

Q. Is that here in the District of Columbia? A. That is correct.

Q. You say you were cruising; does that mean you were driving? A. That is correct, sir.

Q. Where was Officer Hutcherson? A. Officer Bonaparte?

Q. I am sorry, Officer Bonaparte. A. He was riding with me.

Q. Was he in the front or rear? A. He was in the front, passenger side.

Q. Did you observe anything unusual as you were cruising in the 1400 block of Belmont Street about 8:50 that evening? A. I observed General Cab 42 double-parked in the 1400 block of Belmont Street.

Q. Did you see anything else? A. I pulled up behind him and I observed another person standing to the side of the cab as I pulled up behind the cab.

Q. What, if anything, did you do when you pulled up behind the cab in your unmarked police vehicle? A. I blew the horn a couple times and the cab didn't move.

Q. Then what did you do? A. I then got out of the cruiser and walked to the driver's side of the cab and asked the driver, who was identified later as Reuben Harrell, to show me his identification card and his driver's permit.

Q. Now, at the time you got out of your police vehicle, what, if anything, did Officer Bonaparte do? A. Officer Bonaparte got out of the passenger side of the cruiser and went to talk to the person who was standing at the side of the cab.

Q. Did that person remain standing at the side of the cab or move away? A. He walked away, he walked across on the sidewalk when

6 Officer Bonaparte got out of the cruiser.

Q. What was your purpose in asking the driver for his license identification? A. I identified myself, I was going to give him a ticket for double parking, after I blew the horn and he didn't move.

Q. Did you have your ticket book with you at that time? A. No, I didn't.

Q. Was this the first occasion that you stopped people for traffic violations? A. No, it isn't.

Q. You have done this on prior occasions, though you are a member of the Narcotics Squad? A. I have, sir.

Q. Did you notice anything unusual when you asked the individual, the driver of the car, for his driver's license and his identification?

MR. O'HARA: Object, Your Honor, may we approach the Bench?

THE COURT: Yes.

(At the bench:)

MR. O'HARA: I am not sure whether this is the proper time, Your Honor, but we are going to renew our motion to suppress the narcotic evidence. I am not sure whether this is the proper time or not.

* * * * *

7 THE COURT: Yes, but I am going to accept the ruling of Judge Walsh as the law of the case and I am not going into it again. But you can make your objection, of course.

* * * * *

8 MR. O'HARA: Then I would like to go on record to the point that we are renewing our motion to suppress at this time.

THE COURT: Certainly.

(End of bench conference.)

* * * * *

BY MR. HANTMAN:

Q. Officer Hutcherson, I believe at the time of the Court's recess, I had put to you the question: whether or not you noticed anything unusual when you asked the defendant Reuben Harrell for his id. card and his driver's license? A. I observed the defendant Harrell pushing something behind him down in the seat, so I -- and also I noticed one capsule laying on the seat.

Q. What kind of a capsule? A. It was a No. 5 capsule, which is a very small capsule, much smaller than the average size medicine

9 capsule, which, working in narcotics, I have noticed to be a type capsule which is frequently used in the narcotic traffic.

Q. Did this particular capsule contain anything that you could see at that time? A. It contained a white powder.

Q. Now, we talked about Reuben Harrell and we talked about the driver of the car; is that individual in the court room today? A. He is.

Q. Would you point him out for us, please? A. The colored man sitting with the brown sweater on.

MR. HANTMAN: May the record reflect the witness has properly identified the defendant in this case, Reuben Harrell?

THE COURT: Yes.

BY MR. HANTMAN:

Q. When you saw this single capsule, the single No. 5 capsule which is a smaller type capsule than we ordinarily see, and the defendant pushing something down in the seat behind him, what, if anything, did you say or do at that time? A. I asked him to get out of the cab and I got one capsule that was on the seat and also I took the cellophane paper out, which he had pushed in between the seat, and the cellophane paper contained 14 capsules of a white powder.

Q. Was this the same size capsule as the one on the seat?

A. They were. I then placed him under arrest for violation of the Harrison narcotic laws.

* * * * *

CROSS EXAMINATION

BY MR. O'HARA:

Q. As I recall from your testimony, Officer, you were working the 6 to 2 a.m. shift that evening, is that correct? A. That is correct.

Q. The evening of the 31st. What does this encompass, Officer, in the way of duty? A. What do I do during that time?

Q. Yes, please. A. Several things. Mainly we cruise around in the areas that are known where narcotics are usually sold, by narcotic users and peddlers who they frequent, and we take care of complaints that come in from various people in the city, and any other police activity that we come in contact with, we can handle.

Q. Listen to my question carefully: Did you, prior to the point where you approached the defendant's cab that evening, have any report to the effect that he was carrying narcotics that evening? A. No, I did not.

Q. So this was just happenstance, is that correct? A. At this particular time, yes, sir.

Q. What violation was the defendant committing at the time, Officer? A. He was double parked.

Q. Now, is this a violation if the driver is behind the wheel of the vehicle?

THE COURT: What is the question?

MR. O'HARA: My question is, Your Honor: Is this a violation, if you are double parked, if the driver is behind the wheel of the vehicle at the time?

BY MR. O'HARA:

Q. Is this considered a traffic violation within the meaning of our traffic laws and rules of the road in the District of Columbia? A. For over a period of time, yes, it is.

Q. How long a period of time did that take, Officer? A. Well, I observed him when I first turned into Belmont Street, he was parked about middle way of the block; by the time I reached him, he was still parked there, and after I blew my horn, he was still parked there.

21 Q. You turned the corner, is that correct, Officer? A. That is correct.

Q. And how far ahead of you was the automobile? A. I'd say he was about, oh, one hundred feet or fifty feet, maybe more.

Q. How long would you say it took you, after turning the corner, to traverse the distance of one hundred feet with your automobile? A. It was about five minutes, three, four or five minutes. I was driving slowly, anyway.

Q. You were driving at such a rate of speed that it took five minutes or at least four minutes for you to cover one hundred feet; is that correct, Officer? A. It was approximately three or four minutes before I got there, I wouldn't say five minutes, three or four minutes before I got there.

Q. What was happening in the cab, the taxicab, before you -- you had an opportunity to observe what was occurring, is that correct? A. Yes.

Q. What was taking place? A. There was a person standing beside the cab, seemingly talking.

THE COURT: You mean that from the first time that you saw the cab that somebody was on the outside, talking to the driver?

22 THE WITNESS: That is correct.

BY MR. O'HARA:

* * * * *

Q. Now, you said you were going to write a ticket, is that correct? A. I was going to give him a ticket.

Q. But you also added that you didn't have your ticket book with you? A. No, we don't carry ticket books.

Q. How were you going to accomplish that? A. I was going to take

23 him down to the office.

Q. And the violation would have been what? A. Double parking.

Q. Double parking. Was he under arrest at the time that you approached the automobile and asked him for his identification?

A. When I walked up to the side of the car, he was.

Q. He was? A. And I had identified myself, then he was.

Q. You identified yourself as a police officer? A. That is correct.

Q. To the defendant, is that correct? A. That is correct.

Q. All right. Did you say anything with regard to the traffic violation at that time, Officer? A. I told him he was double parked and he was in violation.

Q. Did you tell him he was under arrest? A. I don't recall whether I told him then that he was under arrest or not, but as I identified myself, I told him he was in violation and he was double parked.

Q. Did you consider him under arrest? A. That is correct.

Q. At that time? A. Yes.

24 Q. Now, this was prior to the time that you testified concerning seeing anyone move their hands down in the seat section of the automobile, is that correct? A. Would you repeat the question?

Q. Let me clear that up for you, Officer. Subsequent to, after you had put the defendant under arrest, is that correct, for the traffic violation -- you follow me -- in other words, you came up to the car, showed your identification, at that point you informed the defendant he was double parked, and you considered him under arrest, is that correct? A. That is right.

Q. Now, it was subsequent to this that you saw or you testified that you saw any manipulation with the hand down in the seat section of the automobile, is that correct? A. It was shortly thereafter, when I asked him for his identification and his permit.

Q. But it was after you had him under arrest, is that correct? A. Well, I -- that is correct.

Q. Now, was in fact the defendant booked, as they say, for a traffic violation that evening? A. Was he booked for the traffic violation? No, he was not.

Q. Can you tell me why not? A. At police procedures, when there is a greater offense, the defendant is usually booked on the greater offense.

Q. But isn't it also true if there is a traffic violation involved, where there is a criminal charge also pending, that the traffic violation is also put on the books? A. Would you repeat your question?

Q. Yes. Isn't it also a fact, Officer, that where there is say a traffic violation involved and there is also accompanying or at the same time occurring a criminal arrest or a criminal violation, that along with the booking of the criminal arrest, the traffic violation is also put on the books; is that not correct? A. Some times.

Q. In view of the fact that the traffic violation was never put on the books, Officer, can I imply from that that the defendant was not under arrest?

MR. HANTMAN: Objection.

THE COURT: The objection is sustained, he has already answered that.

* * * * *

BY MR. O'HARA:

27 Q. Directing your attention, Officer, to the cab, did you make an investigation of the cab after the defendant had exited from the taxicab? A. Yes, I did.

Q. And at that time, from your testimony, I understand you located certain capsules of narcotics, one in a loose form, 14 in a cellophane bag; is that correct? Is that your testimony? A. That is correct.

Q. Where were they found, Officer? A. Right where he was seated, on the driver's side.

Q. Can you be more explicit about that? A. The one capsule was laying to his right and the 14 --

Q. How far to his right? A. Right beside -- well, I'd say the width of him, the cap was right beside him on the seat and practically

28 in the middle of the seat.

Q. How many inches away from his body, Officer? A. I'd say two or three inches.

Q. Lying in what area? A. Lying in the middle of the seat.

Q. In the middle of the seat? A. Yes. The 14 capsules in a cellophane cigarette paper were to his left and to the rear of the seat.

Q. So they were out toward the door, is that correct? A. That is correct.

Q. Did you lean your head through the window of the cab, Officer, when you made your investigation concerning the traffic violation? A. Yes, I was standing right up at the window.

Q. Did you have your head in the window? A. I don't recall. The window was down, I don't recall whether I had my head in the window; I don't think I did.

Q. Were you able to observe all parts of the automobile? A. Yes.

Q. In regard to the statement that the defendant made at the precinct, he never made any statement to the effect that he was in possession of the narcotics, is that true, Officer? A. He denied that he -- at the time

29 that I found them, he denied that he knew anything about them. But

then he stated to me, after I got to the Narcotics Squad Office, that he was in that business and he wrote to the --

Q. Go ahead, I am sorry. A. He had wrote to the Attorney General in hopes of getting something done about his dishonorable discharge.

Q. That is not responsive to my question, Officer. Did he ever say, while he was at the precinct, that he was in possession of the narcotics? A. He did not say it in those words.

MR. O'HARA: Thank you.

REDIRECT EXAMINATION

BY MR. HANTMAN:

Q. What did he say? A. He stated he was in the business and he was --

Q. What did he say just with regard to the narcotics? A. He said he preferred not to tell where he got the narcotics from that he had in his cab at that time.

Q. With respect to the location of the cellophane wrapping from the package of cigaretts, which contained the 14 white capsules, can you tell us whether they were between the driver and the door or on the other side? A. They were between the driver and the driver's door.

30 Q. To his left, in other words? A. That is right, to his left.

MR. HANTMAN: That is all.

RECROSS EXAMINATION

BY MR. O'HARA:

Q. One more question, had the automobile ever moved that evening? A. Yes, it was moved.

Q. By whom was it moved? A. I don't recall who moved it.

Q. Excuse me -- are you finished? A. I said I don't recall who moved it.

Q. Did you ever request the defendant to move his automobile to get it out of the line of traffic that evening? A. I don't recall whether I asked him to move it or I moved it, I am not sure, I don't recall.

Q. Do you recall whether the automobile was moved while the defendant was on the scene? A. It was moved, yes.

MR. O'HARA: Indulge me one moment, Your Honor?

THE COURT: Yes.

* * * * *

JOHN H. BONAPARTE

called as a witness by the Government, being first duly sworn, was examined and testified as follows:

* * * * *

CROSS EXAMINATION

BY MR. O'HARA:

Q. What shift were you working that night, Officer? A. Working the 6 p.m. to 2 a.m. tour of duty.

Q. Your partner, as we know from your testimony, is Mr. Hutcherson, is that correct, that evening? A. Yes, sir, that is right.

Q. Had you received any information that night as to the possibility of any narcotics being in the cab No. 42, General Cab Company?

MR. HANTMAN: I object to this, Your Honor please. I would submit to Your Honor this is hearsay that counsel is seeking to elicit from this witness.

THE COURT: The objection is sustained.

BY MR. O'HARA:

Q. But approximately what was the time, Officer, that you came upon the taxicab? A. It was somewhere after 8:30, I believe about 8:50 p.m.

Q. And you were cruising in your general carrying out of your duties that night? A. Yes, sir.

Q. You weren't on any particular case at the time? A. No, sir.

Q. Now, from what direction did you come into Belmont, how did you enter Belmont that night? A. From 14th Street.

Q. And after you entered it from 14th onto Belmont, what did you see, what occurred? A. About the middle of the block, I observed the cab double parked.

Q. How far up was that middle of the block, would you say? A. How many feet, you mean?

Q. Please. A. Well, approximately, maybe 100 feet. I am not very good at --

Q. That is sufficient. How long did it take you to drive, after you had turned onto Belmont, to the parked car? A. I don't remember, just a matter of seconds, I imagine.

Q. Seconds. When you got to the parked car, parked taxicab, what occurred then? A. Officer Hutcherson blew the horn on the cruiser a couple of times.

Q. What was happening up from in the taxicab? A. I could see the driver, the defendant, sitting on the driver's side and another subject standing outside of the cab, apparently leaning in the window.

Q. Could you tell, from their activity, as to what was taking place? A. It appeared that they were having conversation.

Q. There was no indication from their action that the passenger, the person standing beside the cab, was paying his fare to the driver? A. No, sir, it appeared to me as if they were having a conversation.

Q. What was the situation of the traffic, how many lanes were free, Officer? A. There were parked cars on both sides of the street. There was the lane going towards 16th Street, and a lane coming back to 14th Street. The cab was parked in the lane going to 16th Street, traveling west, and there was other cars coming down, traveling east, going towards 14th Street.

Q. Was there any other car double parked at the time? A. I don't remember seeing another car.

Q. You were occupying the passenger seat of the cruiser, is that correct? A. Yes, sir.

Q. And you approached the taxicab from what side, sir? A. The taxicab?

Q. Yes. A. When I got out of the cruiser, I went to the person who was outside of the car, who was then on the sidewalk on the passenger side of the cab.

Q. So he hadn't been standing there very long, had he, from what you know? A. I don't know how long he had been standing there, he was there when we pulled into Belmont Street.

Q. According to your testimony, it was a matter of seconds for you to get up to the cab, is that correct? A. That is right.

Q. And you blew the horn how many times? A. A couple of times.

* * * * *

43 Q. Can you tell me what questions you had asked him? A. I asked him was he employed at this time.

Q. Was there any particular reason for this, Officer.

MR. HANTMAN: Objection.

THE COURT: The objection is sustained.

BY MR. O'HARA:

Q. Can you tell me why you pursued Otey --

MR. HANTMAN: I object -- I withdraw the objection.

BY MR. O'HARA:

Q. -- in view of the fact that he was a passenger and had nothing to do with the car? You were interested mainly, I presume, or let me ask you, your interest in going to the car was because of the traffic violation, is that correct, Officer? A. That is correct.

Q. Can you tell me why you pursued Otey? A. Well, usually, if there are any witnesses in a traffic case, we will get the witness's name and address.

Q. You also ask them whether they are employed or not? A. Yes, sir, we like to have their home phone number and business phone number were we can reach them, in the event we need them as witnesses.

Q. Where did Otey say he worked, if he did?

MR. HANTMAN: Objection, I object now.

* * * * *

RECROSS-EXAMINATION

47 BY MR. O'HARA:

Q. How fast were you traveling in your cruiser, approximately? A. I don't remember, actually. I don't remember the exact speed or approximate speed, I don't imagine we were going over fifteen miles an

48 hour, though, because it is a narrow street there, but I don't remember exactly how fast it was.

Q. You say the distance you transversed was approximately 100 feet, is that correct? A. I guess, I am not very good at approximate footage.

MR. O'HARA: Thank you.

* * * * *

164 Washington, D.C.
December 14, 1961

* * * * *

201 ARTHUR HARRISON OTEY

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. O'HARA:

* * * * *

202 Q. Where was your destination, sir? A. 1429 Belmont Street, Northwest.

Q. And what seat did you occupy in the taxi? A. The front seat.

MR. O'HARA: That is all I have.

* * * * *

[DIRECT EXAMINATION]

205 BY MR. HANTMAN:

Q. Where on May 31, 1961 did you first see the defendant, Reuben Harrell? A. By raising my hand for a cab, on Florida Avenue in the

206 block between 6th and 7th Streets.

Q. And you got in the cab, in the front? A. Yes, I did.

Q. And you told him to take you where, sir? A. To 1429 Belmont Street, Northwest.

* * * * *

207 Q. Did you get this ride gratis -- that is to say, free -- or did you have to pay for it like an ordinary passenger? A. I paid for it, as any passenger. I hailed the cab.

Q. And when and where did you pay Mr. Harrell for this ride?

A. As I was getting out of the cab. In fact, I was standing outside the cab when I paid him.

Q. Where was the cab when you were standing outside and paid him?

A. In front of 1429 Belmont Street, parked alongside another car that was parked at the curb.

Q. In other words, Mr. Harrell was double-parked in the street?

A. Yes.

Q. Did you notice any other vehicle come up behind the cab Mr. Harrell was driving? A. Yes; a cruiser came up behind the cab as I stepped out of it.

Q. And where were you at that time? A. Outside the cab.

Q. What did you see occur when the vehicle came up? A. Well, an officer, whom I learned at that time was an officer, Bonaparte, asked me to stop, that he wanted to speak to me for a moment.

* * * * *

[Filed January 19, 1962]

DENIAL OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

On this 19th day of January, 1962, came the Attorney of the United States, the defendant in proper person, and by his counsel, H. Kenneth Schroeder, Esquire; whereupon, the motion of the defendant to suppress evidence, coming on to be heard, after argument by counsel is by the Court denied.

The defendant is remanded to the District of Columbia Jail.

By direction of

Matthew F. McGuire
Presiding Judge
Criminal Court # Assign.

* * *

* * *

[Filed Oct. 17, 1962]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS
ON TRIAL MOTION TO SUPPRESS EVIDENCE

1

Washington, D. C.
Monday, January 22, 1962

Before Judge H. A. SCHWEINHAUT, this case came on for trial at 10:25 a.m. today.

* * * * *

3 (At the Bench:)

RENEWAL OF MOTIONS IN BEHALF OF DEFENDANT

MR. SCHROEDER: Your Honor, at this time I would like to renew all prior motions that have been made, beginning with the motion to suppress the evidence, motion for judgment of acquittal, and motion to quash the indictment.

THE COURT: Assuming you have a right to renew them, which I assume you do have, were they denied with prejudice or just denied?

MR. SCHROEDER: Just denied.

THE COURT: I suppose then you have a right to renew them. But

4 I can't rule on them until I know what I am ruling on. I don't know the basis for them.

MR. SCHROEDER: Then I will wait until the first officer is called.

THE COURT: What is the basis of your motions?

MR. SCHROEDER: The basis of the motion to suppress is that the arrest was invalid and therefore the search was illegal.

* * * * *

THE COURT: Before Judge McGuire?

MR. SCHROEDER: Right. I just want to renew this motion, to preserve the record.

THE COURT: You will in any case have the right to make objections to the testimony. If you do, and I should grant them, it would operate to really grant the motion, I guess, assuming that.

5 Is there anything else to your case?

MR. HANTMAN: No, Your Honor.

THE COURT: Then I will hear it in the presence of the jury and rule on it.

MR. SCHROEDER: On a motion?

THE COURT: In the form of an objection, because there is no need to hear your objection out of the presence of the jury; and if I grant it, the case falls. If I deny it, you are not prejudiced.

MR. HANTMAN: But I do not feel, if Your Honor please, if I may be heard, that counsel's argument on the motion to suppress, if he makes it during the course of the trial, ought to be heard by the jury, because I think his argument --

THE COURT: May affect their judgment?

MR. HANTMAN: Yes, may affect their judgment.

THE COURT: Then when the time comes that you may have an objection to make on that ground, I will exclude the jury and hear you. But it will be in the form of an objection to a line of inquiry.

MR. SCHROEDER: Yes, Your Honor.

THE COURT: I am not going to rule again on a motion as such to suppress the evidence. We will be in an evidentiary posture.

(Counsel returned to trial tables.)

* * * * *

[Filed Oct. 23, 1962]

EXCERPTS FROM OFFICIAL TRANSCRIPT
TESTIMONY OF: OFFICERS MACEO HUTCHERSON, JOHN H. BONAPARTE, JOSEPH W. HEATH

Washington, D. C.
Monday, January 22, 1962

1

Before Judge H. A. SCHWEINHAUT, this case came on for trial at 10:25 a.m. today.

* * * * *

3 MR. HANTMAN: Call Officer Hutcherson, please -- Maceo Hutcherson.

Thereupon

MACEO HUTCHERSON

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HANTMAN:

* * * * *

Q. I would like to direct your attention, if I may, sir, to the even-

4 ing of May 31, 1961. Do you recall where you were working and with whom on that date, sir? A. Yes, I was working the tour of duty from six p.m. to two a.m., with my partner, Detective Bonaparte.

Q. Were you driving a vehicle that day? A. I was driving a plain car cruiser, police cruiser.

Q. When you say "plain car," what kind of a vehicle are you referring to? A. An unmarked police car.

Q. It didn't say "Metropolitan Police Department" on it? A. No, it didn't.

Q. At about 8:50 that evening do you recall where you were on that date, at or about that time, sir? A. Yes, sir. I was cruising in the vicinity of 14th and Belmont Street, Northwest, in the District of Columbia.

Q. Who was driving? A. I was driving.

Q. Who else was in the car at that time? A. Officer Bonaparte and Private Heath.

Q. Where was Officer Bonaparte seated? A. Officer Bonaparte was seated on the passenger side of the front seat.

Q. And Officer Heath? A. Was in the back seat.

5 Q. Now, did you notice anything unusual when you turned into Belmont Street at that time? A. Yes, I observed a General Cab No. 42 double parked about middle way of the block of the 1400 block of Belmont Street.

Q. When you made this observation, sir, what if anything did you do?

A. I pulled up behind the cab and blew the horn a couple of times, and he didn't pull off.

Q. What was the defendant doing that you could observe at that time? A. It seemed he was talking to another person standing outside the cab.

Q. The person was outside, on which side of the car? A. He was outside, on the passenger side of the cab.

THE COURT: On the curb or sidewalk side?

THE WITNESS: Yes, that is correct.

BY MR. HANTMAN:

Q. But the car was in the street; is that correct? A. That is correct.

Q. Did the defendant move his cab when you blew the horn? A. No, he didn't.

Q. And when the defendant did not respond --

6 THE COURT: I suppose you told us; but I missed it. What time was this?

THE WITNESS: Eight-fifty p.m.

BY MR. HANTMAN:

Q. When the defendant did not respond by pulling ahead or moving his cab on, what if anything did you do, sir? A. I got out of the cruiser and walked up to the driver's side and asked the defendant for his hacker's identification and his driver's permit.

Q. Did Officer Bonaparte do anything at that point? A. He got out, yes, Officer Bonaparte did; he got out of the cruiser and walked over to the person who had walked away as I got out of the cruiser, and approached him and talked to him.

Q. What was your purpose in asking the defendant for his identification? A. I told him he was double parked and I was going to give him a ticket for being double parked.

Q. Did you have your ticket book with you at that time? A. No, I didn't.

Q. And is this the first occasion when you have stopped motorists for a traffic violation? A. No, it isn't.

Q. You have done that previously? A. I have.

7 Q. And how were you going to accomplish this matter of giving the defendant a ticket for this violation? A. I was going to take him down to the office where we do have a ticket book.

Q. At the moment when you asked the defendant for his identification -- his driver's license, his permit, his so-called "face," I take it -- where was he at that moment? A. He was seated behind the wheel.

Q. Did you notice anything unusual when you asked him for that?

MR. SCHROEDER: Objection, Your Honor. I object to that question on the basis that whatever was seen and observed was done in an illegal manner with regard to the invalid arrest.

THE COURT: I suppose now is as good a time as any. I can't see the validity of your objection on its face at this time, but it may be that it is just as well now as later to go into it thoroughly. I will excuse the jury.

* * * * *

8 (The jury having left the courtroom:)

THE COURT: Let me suggest, Mr. Schroeder, that on the face of it at this time, if this defendant was double parked and didn't move on when the officer honked -- possibly because he thought it was some civilian honking and he could just wait until he got ready to move on, and which is not unknown -- but assume that, and that is all I know of up until now, this officer had a right to put him under arrest for a traffic violation. Can there be any doubt about that?

MR. SCHROEDER: There is a great doubt, Your Honor, for the plain and simple reason it is our contention that double parking to load or unload a passenger is not a traffic violation. Section 76, Section 79-C and 79-E-3, of the D. C. motor vehicle traffic regulations, specifically state that a passenger vehicle may double park at any time for the purpose of loading or unloading passengers. It is our contention that Mr. Harrell was doing nothing more than this.

9 THE COURT: Except that the other man was standing alongside of the car at the time. You mean that is consistent with his paying a fare?

MR. SCHROEDER: As Your Honor well knows, it is quite possible it doesn't need much imagaination to visualize either Mr. Otey about to get into the cab at that time, or --

THE COURT: How do you spell that?

MR. SCHROEDER: He is the passenger -- O-t-e-y.

There was no probable cause for making an arrest at this moment; and before an arrest can be valid, probable cause must be established for making such arrest.

THE COURT: The police officer has a right surely under such circumstances to go around to the driver's side and ask the driver for his identification and driver's license.

MR. SCHROEDER: We don't deny that, Your Honor.

THE COURT: And thus find out what the situation is. If it turns out to be just a passenger paying his fare, then obviously he is entitled to time enough to do that.

MR. SCHROEDER: We are in entire agreement on that point, Your Honor. However, a police officer does not have a right to place a man under arrest under these circumstances which happened in this case. It was the testimony of the officer himself that at the time he walked up for the man's identification card, he said the man was under arrest at that very point.

THE COURT: But he hadn't in fact arrested him.

MR. SCHROEDER: He said he did. And we have to accept his testimony.

THE COURT: I don't agree with you.

MR. HANTMAN: No, Your Honor. May we have the record read back?

THE COURT: No; I don't think that is necessary.

MR. SCHROEDER: Not at this time.

MR. HANTMAN: As I recall it, Your Honor, --

THE COURT: Let us find out again. And then if the officer's testimony is contrary to what he said before, you can show that.

What happened?

THE WITNESS: You want me to state what I did?

THE COURT: Yes.

THE WITNESS: As I stated, I honked the horn a couple of times and he didn't move. And then I got out of the cruiser and walked up to the driver's side, and asked him for his hacker's identification and his identification card. I mean the driver's permit -- his hacker's identification and D. C. driving permit.

THE COURT: You had the intention to arrest him. Had you arrested him?

11 THE WITNESS: No, I didn't tell him he was under arrest then. I observed something before I told him.

THE COURT: What did you observe?

THE WITNESS: As he was trying to give me his hacker's identification card and his permit, I observed him push something behind the seat. And then he reached over to the pocket.

THE COURT: To the what?

THE WITNESS: To the pocket of the cab.

THE COURT: The glove compartment?

THE WITNESS: The glove compartment. And when he straightened back up, I saw a capsule laying in the seat.

THE COURT: Alongside of him?

THE WITNESS: In the middle of the seat, yes.

THE COURT: On his right?

THE WITNESS: On his right.

THE COURT: Were there any lights on in the car?

THE WITNESS: Yes, his lights were still on.

THE COURT: Dome light?

THE WITNESS: Yes, sir.

THE COURT: Was the curb door of the cab open?

THE WITNESS: No, sir, the door wasn't open.

THE COURT: But the dome light inside --

THE WITNESS: No, just the lights from the dashboard.

12 THE COURT: The dashboard?

THE WITNESS: Yes, sir.

THE COURT: What kind of a light was it?

THE WITNESS: The light that shows the meters and the speedometer and all.

THE COURT: Well, go ahead.

THE WITNESS: I observed this capsule. I then placed him under arrest and told him to get out of the cab.

THE COURT: Why?

THE WITNESS: Because I observed the capsule, and I recognized it as being the capsule that is frequently used in narcotics.

THE COURT: One?

THE WITNESS: Yes, that is correct.

MR. HANTMAN: May I ask a question or two?

THE COURT: Yes.

BY MR. HANTMAN:

Q. Did you know the passenger that was standing outside, or the individual that was standing outside? A. Officer Bonaparte knew the person who was on the outside.

Q. And how was he known? Do you know? A. He was known to us as a narcotic violator.

THE COURT: What do you mean by "violator" -- addict or peddler?

13 THE WITNESS: He had been convicted, and he was a user at one time.

THE COURT: The man on the curb side?

THE WITNESS: Yes, sir.

BY MR. HANTMAN:

Q. You saw the one capsule, and you asked the driver to get out of the car? Is that correct? A. That is right.

Q. Which side of the car did he get out on? A. He got out on the driver's side.

Q. And then what if anything did you do?

THE COURT: When he got out, did he leave the capsule on the seat?

THE WITNESS: Yes, the capsule was still on the seat. I reached in

and got the capsule, and also this piece of paper off a cigarette package, stuck between the seat to his left.

THE COURT: In the back of it?

THE WITNESS: Yes. And I pulled it out and it contained 14 capsules.

MR. HANTMAN: That is all the testimony I believe we need adduce at this point.

CROSS EXAMINATION

BY MR. SCHROEDER:

* * * * *

16 THE COURT: My point now is that the words mean nothing, except as they reflect the intent of the police officer. A police officer can't make an arrest by thinking he is doing it, or by telling us here that he did it. The question is whether he did in fact and in law, therefore, make an arrest.

17 Now his own testimony up to now, and there in the prior trial, clearly shows that the defendant at that time was not under arrest. He intended to arrest him; but until he put him in custody, he wouldn't have been under arrest. Now if he had taken him, literally began the process of doing what he intended to do, to take him down to the precinct or wherever, to give him a ticket, then he would have been in custody; and whether he had the ticket in his hand or not, he would have been arrested. I have no doubt on that.

* * * * *

THE COURT: One walks away, shall we say, at his peril indeed; and it may be that that will result in a physical detention of him, and some stronger charge.

My point is a simple one, and it is this, that a police officer can't make an arrest simply by thinking it or later telling us here that the man was under arrest.

18 Now if he tells the man, "You are under arrest," I think that is probably enough. If he goes beyond that and gives him a direction to follow him, or "Get out and come with me, because you are under arrest," that certainly would be an arrest, I would think.

* * * * *

23 MR. SCHROEDER: And we submit, Your Honor, there was no violation in this case.

THE COURT: Yes, there could have been. The car was double parked, either legitimately or not. If he was double parked to have a conversation with a friend whom he had just deposited -- and it turns out in this case from your opening statement that that is the fact --

MR. SCHROEDER: We don't deny that.

THE COURT: Your opening statement told me so.

MR. SCHROEDER: Right.

THE COURT: Otey, or whatever the fellow's name is, wasn't a passenger; he was a friend and Harrell was driving him home.

MR. SCHROEDER: He was a passenger being discharged.

THE COURT: That would have been all right. He would have a right, even driving a friend home, to stop long enough to let him out, I would say, under the local ordinance.

24 But the situation which this officer saw was at least equivocal on its face. There was an apparent or could have been an apparent violation, because just the mere fact of the double parking suggests the possibility of it, giving an officer the right to inquire.

Now if, having honked his horn, the car started to drive off, without slamming it into gear and rushing away, but if he made some attempt to move, there wouldn't have been a traffic violation of any kind and the officer would have had no right to stop the car at all. But he honked the horn, he said, twice and the car didn't move -- which surely gave the police officer a right to find out why he wouldn't move, and therefore to go and ask for his identification and his hacker's license, in the process of which he intended, he says, to give him a ticket. I am not concerned with that, because it doesn't matter what his intention was. He was not yet in custody. This officer was in the process of doing what he had a right to do, to ask for the hacker's license and the driver's permit. In the process of that being obtained --

Where? Out of his pocket, or the glove compartment?

THE WITNESS: He looked in his glove compartment.

THE COURT: In the process of the defendant's giving him what the officer had asked for and was entitled to have, by reason of the light on the dashboard he was able to see the capsule. What more do you want?

25 MR. SCHROEDER: We submit, Your Honor, that an officer does have a right to ask a motorist to see his identification and his registration and what have you; and also submit had the police officer not arrested the defendant at that time, and then saw the capsule and made the arrest, there would be no question.

THE COURT: But he didn't arrest him at that time.

* * * * *

26 MR. HANTMAN: If anything, if Your Honor please, the Rios case supports the position of the government. When the officer saw the single capsule on the seat, he asked the defendant to step out of the car. At that very moment the defendant was under arrest.

THE COURT: Right -- and not until then.

MR. SCHROEDER: We can prove that to the contrary, by the officer's testimony itself.

THE COURT: Go ahead.

MR. SCHROEDER: This is the question:

"You came up to the car, showed your identification; at that point you informed the defendant he was double parked, and you considered him under arrest; is that correct?

"Answer: That is right.

"Question: Now, it was subsequent to this that you saw or you

27 testified that you saw any manipulation with the hand down in the seat section of the automobile; is that correct?

"Answer: It was shortly thereafter, when I asked him for his identification and his permit.

"Question: But it was after you had him under arrest; is that correct?

"Answer: Well, I -- that is correct."

The officer himself admitted he didn't see the capsule until after he had arrested the man.

MR. HANTMAN: If Your Honor please, counsel I am afraid doesn't understand the facts of his own case, because the arrest in this case has to turn on what the officer saw prior to the search he made of the vehicle, or what he saw stuffed down. I submit to Your Honor that at the very moment the police officer asked the driver, the defendant, for his identification, and saw this small, number 5 capsule, which he recognized as a narcotic capsule, he saw a felony committed in his presence. And of course --

THE COURT: Mr. Schroeder's latest point is that the testimony which he just read -- I don't need it -- at the prior trial has the police officer informing the defendant that he was under arrest before he saw the capsule. If that is so, he had made an arrest, because if you tell a man he is under arrest, then you have made an arrest.

28 MR. HANTMAN: Yes, I would say that is correct, Your Honor. But I submit to Your Honor that the factual situation in this case has to control, not what an officer believes.

THE COURT: I know it. But what I will do is let the jury hear this evidence. From the excerpt that was last read by Mr. Schroeder, I gather that it will turn on a factual issue; and probably I will have to instruct the jury as to what the law is, and depending upon how they find the facts. But it seemed to me at first, on the face of it, that it was just a matter of law and not one of fact.

MR. HANTMAN (to counsel for defendant): May I have a reference to that?

* * * * *

36 BY MR. SCHROEDER:

Q. You do recall testifying in the first case on December 13th, do you not, Officer? A. I do recall testifying.

MR. SCHROEDER: I will start right from the cross-examination of Mr. O'Hara.

* * * * *

40 [Mr. Schroeder: Reading]

"Question: And the violation would have been what?

"Answer: Double parking.

"Question: Double parking. Was he under arrest at the time
41 that you approached the automobile and asked him for his identification?

"Answer: When I walked up to the side of the car, he was."

THE COURT: If he agrees today that that is so, I would strike it as a conclusion of the witness, as to whether the man was under arrest or not.

MR. SCHROEDER: If a police officer can't say who was under arrest, who can?

THE COURT: Of course he can't say he was under arrest.

What the substance of that question and answer is is this, and it is almost expressly so, that this police officer says, "On my way to the automobile, I had the man under arrest." Well on its face he obviously did not have, and his conclusion as to what amounts to an arrest is meaningless. It is what he did or said to the defendant, not to himself.

MR. SCHROEDER: Later testimony will show that, though, Your Honor.

THE COURT: Go ahead. But up to now it is meaningless. He was not at that time under arrest.

Now do you want to say something?

THE WITNESS: Yes, sir. At this time I didn't tell him he was under arrest; but I did later tell him he was under arrest, and that is when
42 I told him to get out of the car and I put my hand on him. I did tell him he was under arrest then. That was the only time I told him he was under arrest.

THE COURT: We will come to that later.

BY MR. SCHROEDER:

* * * * *

43 Now Mr. O'Hara attempted to clarify this whole situation. He said:

"Let me clear that up for you, Officer. Subsequent to, after you had put the defendant under arrest, is that correct, for the traffic violation -- you follow me -- in other words, you came up to the

car, showed your identification, at that point you informed the defendant he was double parked, and you considered him under arrest, is that correct?

"Answer: That is right."

THE COURT: All right. Now let me interrupt you there. We get into a question of semantics by that question. At that time "you informed him he was double parked," and what? -- "and considered him" --

MR. SCHROEDER: -- "he was double parked, and you considered him under arrest."

THE COURT: You see, "and you considered him under arrest" relates back to his prior question of this witness. You have to separate that question into two parts. One is that he informed the man he was double parked or was in violation, or both. That is a statement of fact, which does not amount to an arrest.

The other part is that he considered him under arrest, which is nothing but a conclusion. A policeman may consider a man to be under
44 arrest, when in law he is not under arrest at all. A policeman may consider that he has not arrested an individual, when in law he has. And so that question, and therefore whatever answer there is to it, is utterly meaningless.

* * * * *

45 MR. SCHROEDER: But this officer did realize it. He said he was under arrest.

THE COURT: He didn't communicate it at that time, according to anything you have yet read, to the defendant -- except to tell him he was double parked and in violation.

Now let's suppose a police officer says to a man, "You are double
46 parked and you know it, and I honked my horn twice and you didn't move; and it is a violation of the law." Do you consider that an arrest? No, you don't, because if you think a step beyond that you may decide or may come to the conclusion and it may be the fact, that the officer says, "Don't do this any more. Now get on your way and don't do this any more."

No arrest has ever been made. An admonition or a reprimand and

a caution have been given by the officer, who thinks and who has said to the individual, that "You have violated the law" -- which means that you are subject to arrest, and that is all it means.

MR. SCHROEDER: I won't attempt to contradict Your Honor's hypothetical. But, looking at the whole factual picture in this case, the officer then testified he was going to take the man down to the office; and in order to do so he would have to be under arrest.

THE COURT: Didn't he say he told the defendant that? That was his intention, apparently, when he started to the car which hadn't moved off when he honked, that that was his intention to take him down. If he had started to do it in any manner at all, such as telling him to get out of the car, there was when the arrest took place.

MR. SCHROEDER: Once again we would like to reiterate the part
47 from the Rios case, where the Supreme Court made it clear in that case that if at the time the officers stopped the car they considered the defendants under arrest, the arrest was illegal and the search that followed thereafter was also illegal, because there was no probable cause for even thinking that an arrest could be made.

THE COURT: I understand.

MR. SCHROEDER: And once again I would like to reiterate this point, that supposedly the arrest was for a traffic violation; the defendant was never charged with a traffic violation -- like in Kelly, the arrest was supposedly for vagrancy; the defendant was never charged with vagrancy.

We submit this motion to Your Honor and would request that you rule on it, rather than the jury.

THE COURT: We haven't finished with this witness yet on the question. I want to know what he did.

What you have read so far I will hold, if he agrees that he gave that testimony before and that it is now his testimony, I will say that that is not an arrest.

MR. SCHROEDER: The next question:

"Now, it was subsequent to this that you saw or you testified

that you saw any manipulation with the hand down in the seat section of the automobile; is that correct?

48 "Answer: It was shortly thereafter, when I asked him for his identification and his permit.

"Question: But it was after you had him under arrest; is that correct?

"Answer: Well, I -- that is correct."

THE COURT: And that answer clearly means, "Well, I guess so."

MR. SCHROEDER: The officer is a trained individual. He knows how to handle himself on the stand, Your Honor. He knows when he has made an arrest and when he hasn't.

THE COURT: No, he doesn't. And it would be very, very helpful indeed to the Court if police officers always did know when they had made an arrest and when they hadn't. We would have far less trouble in trials if they did.

MR. SCHROEDER: So as it stands now, we must look to other opinions of the Court to determine when an arrest has taken place.

THE COURT: I am fairly well familiar with them.

MR. SCHROEDER: I am aware of that.

THE COURT: Hopefully, that is.

MR. SCHROEDER: And we submit that on these facts, and taking into consideration the Kelly case, the Di Re case, the Rios case -- and the Henry case. Let me expound on the Henry case, if I may. In the Henry case the agents had a suspicion that the defendants involved were

49 transporting illegal liquor or stolen liquor. They approached the car and stopped the car. They looked in and saw cartons. At that time the defendants were under arrest. It turned out that the cartons were not liquor, as they thought, but rather radios and appliances. The Court held in that case that there was no probable cause from the very start of their action, and threw the evidence out.

THE COURT: I don't have any trouble with that reasoning or that conclusion at all.

MR. SCHROEDER: It goes back to our point, Your Honor, where we

submit there was no probable cause right from the beginning to make an arrest; and when an officer testifies he arrested a man, I accept that officer's word.

THE COURT: My position on that I will reiterate, when a car is double parked, even though it is obviously a taxicab -- because he says this was marked, and with a taxi license too -- even though it is a taxicab, if it is double parked, and the door is closed, and a man is still standing outside. Though the door is closed, he may or may not have paid his fare. But he was double parked when this officer first turned into Belmont. He had to drive a hundred feet, or whatever it was. He said it took him four or five minutes. Obviously it didn't take him four or five minutes -- he is clearly mistaken about that -- because even driv-

50 ing slowly you would get there sooner than that. In any event, he drives up behind him. They are still talking and still double parked. He sees no evidence of a financial transaction, any hand moving through a window that may have been indicative of paying a fare. And he honks twice, and still the car doesn't move on.

That is an indication of the fact that he is illegally double parked, because after a taxicab puts off a passenger he can't sit there and have a conversation with him. There comes a time when he has got to move on or he is in violation of the law.

This officer, according to everything including the cross-examination in the trial before and what little I have heard in this trial, indicates clearly this, and this only, that those circumstances justified this officer in getting out of the car and going up to ask the driver how come he is still parking there, because he may or may not be in violation.

The officer has reached the conclusion that he is in violation -- which doesn't mean a thing to me one way or the other. I don't care what his conclusions are. But he was justified in making further inquiry. He goes to the car. He identifies himself. He tells the man he is in violation -- which is still not an arrest -- and asks him for his identification

51 as a hacker and his driver's license.

In the process of accomplishing that legitimate police purpose, he sees a capsule, and he tells him to get out of the car. That is when the arrest occurred. He is then interfered with and deprived of freedom of locomotion.

Up to now he hasn't told the defendant he is under arrest. So in no way has he communicated an arrest to the defendant. He has asked him for his license, which means he may look at it and forgive him and tell him to get on about his business. So he hasn't been arrested.

But in the process of all this he sees something that alerts him to a real felony, not a misdemeanor or delict, a traffic violation. However, I will have to hear it.

MR. SCHROEDER: All I can do now, then, is object to His Honor's summation of the facts, because it contradicts the actual testimony of the officer.

THE COURT: In what respect?

MR. SCHROEDER: The officer testified he considered the man under arrest when he asked for the ID card. Your Honor has stated he was arrested after he saw the capsule.

THE COURT: I just said I had better hear that. I am trying this case myself. What we have been doing now is exploring what happened in some other trial.

MR. HANTMAN: If Your Honor please, the counsel has put a series
52 of questions and answers to the witness from the prior trial. I do not believe the witness has as yet either acquiesced or denied the testimony therein.

THE COURT: No, he hasn't.

MR. SCHROEDER: Your Honor, I stated to the witness that if he did not agree with what I was reading, he would object, and I have heard no objection.

THE COURT: But we didn't really give him a chance. I am holding nothing until I hear further from him.

BY MR. SCHROEDER:

Q. Officer, you have heard what I have read you a number of times.

Do you agree with what was read to you, or do you deny it? A. I agree to the fact that I identified myself and I asked him for his identification card and his hacker's face. And I didn't at this time tell him he was under arrest. When I asked him for it, he pushed something in his seat. And then he reached over -- he looked under his seat and he reached over to the glove compartment. He took out, I think it was his hacker's face. And as he handed it to me I saw the capsule. Then I told him to get out of the car, and I placed my hands on him. I then told him he was under arrest, and I kept my hands on him, until a wagon had arrived.

Q. So then am I to understand that you deny your statement that you

53 considered the defendant under arrest at the time you asked him for his ID card? A. That is correct.

Q. You now want to contradict that statement? A. Would you repeat the question?

Q. You now want to contradict your statement made at the prior trial, that you considered the defendant under arrest when you walked up to the car and asked for his identification card?

THE COURT: I won't let him answer that, because to my mind it is wholly unimportant and immaterial, whether he considered it.

MR. SCHROEDER: Your Honor, --

THE COURT: I haven't gotten over to you my own thinking at all, have I?

MR. SCHROEDER: Yes, sir, you have. I am not going into that point now, whether he considered him under arrest or not. All I am asking now is whether he would now like to deny making this statement.

THE COURT: You may answer that.

BY MR. SCHROEDER:

Q. Do you now at this time, Officer, deny having made this statement under oath, that when you came up to the car and showed your identification and informed the defendant he was double parked, that you con-

54 sidered him under arrest when you asked him for his identification card? A. I don't recall whether I --

MR. HANTMAN: If Your Honor please, now just a minute. Counsel has not asked the witness the square question and square answer, but has rather put to the witness a question of his own which Your Honor has just a moment ago ruled on as being an operation of the mind of the witness which is subject to motion to strike.

THE COURT: I am not going to let you ask that question, or let the witness answer it, because I don't care whether he agrees with it or not. It is immaterial. And when the jury comes in -- and, for the record, I will protect you now -- I will not permit you to ask him whether he considered the defendant under arrest. I am going to have you confine yourself to what he actually did. His intention you may ask him about.

MR. SCHROEDER: May I ask him if there is an inconsistent statement with regard to what he will say today and what he has testified to prior to this?

THE COURT: Not if it has to do with whether he considered the man under arrest.

MR. SCHROEDER: No; but if there is an actual inconsistent statement of fact.

55 THE COURT: Oh yes, you may ask him.

MR. SCHROEDER: I think such inconsistency has been brought out at this point, and on that basis I would like now to see the Grand Jury minutes of this officer's --

BY MR. SCHROEDER:

Q. Officer, did you testify before the Grand Jury? A. I did.

MR. SCHROEDER: I would now like to see a copy of the Grand Jury minutes.

THE COURT: No, I won't permit you to see a copy of the Grand Jury minutes.

You may ask him anything you want from the prior trial, without letting the jury know that it is a prior trial of this case. Ask him if he testified in court that so and so and so and so -- except that I am not going to permit, because sui sponte I would have stricken the question if I had presided at the prior trial -- I will not permit you to ask him whether

he said earlier, at the other trial, nor will I permit you to ask him now, whether he considered the defendant under arrest. I will permit you to ask him, if you wish, what his intention was when he went to the car.

MR. HANTMAN: May I just make the one observation, that this witness, even at the prior trial, never said in so many words that he considered the defendant under arrest. He was merely responsive to counsel's

56 question and counsel used the language.

THE COURT: I realize that. But that is moot. I mean, that doesn't matter, because I wouldn't have permitted it the first time, and I am not going to permit it now.

MR. HANTMAN: All right, sir.

MR. SCHROEDER: I don't mean to try upon Your Honor's patience. I just have two more things.

THE COURT: Sometimes when I engage in repartee with counsel and there is a back and forth, I may give the impression of being impatient, when it is not that at all. It is just interest in the problem, and in my own thinking I guess I go back to long days ago.

MR. SCHROEDER: What I would like to do at this time, Your Honor, is respectfully record my objection to the restraint on the questioning of what he considered.

THE COURT: Very well.

MR. SCHROEDER: And also ask Your Honor to rule on the motion presented to you.

THE COURT: I want to hear further from him on what actually happened. He got stopped almost at the beginning. All you have done, since the jury has been out -- and you got no where before they went out -- all you have done since the jury has been out is ask him what about his answers at the prior trial. Let's bring him up to date, and then I will rule.

57 MR. HANTMAN: May I proceed to bring the witness up to date?

THE COURT: Yes.

DIRECT EXAMINATION (RESUMED)

BY MR. HANTMAN:

Q. Officer, before the jury departed you were telling us that you approached this car, which you later learned was being driven by the defendant; you observed this vehicle to be double parked in the 1400 block of Belmont Street, Northwest, and you approached this car and blew your horn twice. Is that correct? A. That is correct.

Q. What if anything did the car or the driver of the car do? A. It was still standing. It didn't move.

Q. And there was an individual outside? A. That is correct.

Q. On the passenger's side? A. On the passenger's side.

Q. What if anything did you do at that point, sir? A. I then got out of the cruiser and walked up to the driver's side, and asked the driver

58 for his hacker's identification card and his permit.

Q. In doing that did you observe any unusual motion by the defendant? A. I did observe the defendant pushing something to his rear, with his left hand, between the seat.

Q. And did you see anything else unusual at that time, sir? A. As he was getting his identification card, I did observe a capsule on the seat.

Q. What kind of a capsule, sir? A. A No. 5 capsule.

Q. What is a No. 5 capsule? A. It is a capsule which is mostly used in the narcotic traffic here in the District of Columbia.

Q. Is it larger or smaller? A. It is a smaller capsule than the average medicine capsule.

Q. When you observed this capsule, was it a filled capsule or an empty one, sir? A. It contained a white powder.

Q. And when you saw this capsule, what if anything did you do, sir? A. After I observed the capsule, I then asked the defendant to get out of

59 the cab, and I placed my hand on him and I told him he was under arrest, for violation of the Harrison --

Q. Then what did you do, sir? A. I then reached into the cab and took out the paper which I observed was off a cigarette package, which was sticking between the seat; and it contained 14 capsules. I called out

to Officer Bonaparte that I had found some capsules in the cab.

Q. This paper you speak of, sir, what kind of a paper was it?

A. It was a cellophane wrapper from a cigarette package.

MR. SCHROEDER: Objection. The witness isn't qualified to say whether a cellophane wrapper is from a cigarette package. It is speculation.

* * * * *

60 BY MR. HANTMAN:

Q. Can you identify that cellophane wrapping? A. I can.

Q. When and where was the first time you saw that, sir? A. This is the cellophane wrapping that I took from the seat of the cab -- General Cab 42 -- which the defendant was driving, and I placed my initials on it.

Q. Does it have any ink imprint on it? A. It has the cigarette stamp number on the bottom of it, and also "cigarettes" wrote on it.

* * * * *

62 CROSS EXAMINATION (RESUMED)

BY MR. SCHROEDER:

Q. Officer, you testified that on the night of May 31st you were on duty from -- two p.m. to six a.m.? A. Six p.m. to two a.m.

Q. Six p.m. to two a.m. I am sorry. And that you were just cruising in the vicinity of Belmont and 14th? A. That is correct.

Q. Were you there on any specific reason? A. That is one of the areas we cruise in. As I said, we were working, and that is our specific duty.

63 Q. Had anyone, by way of an informer or something of that nature, given you a tip as to anyone transporting narcotics? A. Prior, I had information prior to this particular person, but not that particular day.

Q. On this date did you receive any tip? A. No, not that day.

Q. No tip at all? A. No.

Q. Were you looking for any particular person in that area when you were on patrol? A. No, we weren't looking for any particular person.

Q. You were just cruising the neighborhood as is part of your duties?

A. That is correct.

Q. Now when you turned off of 14th Street, you started heading west on Belmont; is that correct? A. That is correct.

Q. Down towards 16th Street? A. Towards 15th Street.

Q. What did you observe as you turned the corner? A. I observed the cab, General Cab 42, double parked, in approximately the middle of the block.

Q. And what else did you observe? A. And another person standing outside of the cab, seemingly talking.

64 Q. Did it appear as though he were paying a fare, or anything of that nature? A. I didn't see his arm going in the cab, or the driver leaning over to receive a fare.

Q. How long did it take you to get from the corner of 14th and Belmont to where the car was parked? A. It was a short time. I don't recall exactly how long it took.

Q. Do you recall about how fast you were traveling, after you turned the corner and started heading down Belmont? A. About five or ten miles an hour.

Q. After you pulled up behind the car, you beeped your horn; is that correct? A. That is correct.

Q. How many times did you beep it? A. Twice.

Q. Was it a quick beep-beep, or was it one beep and then wait a period of time, and then another beep? A. Oh, I blew my horn and paused, and blew it again.

Q. How many seconds would you say elapsed between the time you blew your horn and the time you started to leave your car? A. Oh, I would say five to ten seconds.

65 Q. After you left your car, Officer Bonaparte at the same time came out the passenger side? A. That is correct.

Q. What was Private Heath doing at this time? A. He was still seated in the car.

Q. He was still seated in the back of the car. He never left the car? A. He never did.

Q. Where did you park the car before you got out? A. I was parked directly behind him.

Q. You were double parked, also? A. Yes, I was.

Q. You started walking toward the General Cab 42? A. Yes, I walked up to the driver's side.

Q. What was your intention for getting out of your car and walking towards General Cab 42? A. To question him, and also check the permit and registration.

Q. That was all? A. At the time, yes.

Q. At the time you started to leave your car you never had the intention of charging the defendant with a traffic violation? A. Not at that present time when I left the car, no.

MR. SCHROEDER: Would Your Honor indulge me a moment, please?

66 BY MR. SCHROEDER:

Q. What was your purpose in asking Mr. Harrell, the defendant, for his identification?

MR. HANTMAN: I will object, if Your Honor please.

THE COURT: On what ground?

MR. HANTMAN: The machinations of this officer's mind at the time I do not believe are germane to the issue that is presently before the Court, namely, the legality of the arrest and the subsequent search.

THE COURT: I think he is entitled to ask what his purpose was. I overrule the objection.

You may answer it.

THE WITNESS: Upon stopping or questioning any person who is driving a vehicle, the first thing I would do would check to see if he had a permit or if he had a registration card. And due to the fact that it was a cab, I was going to check to see if he had a hacker's license.

BY MR. SCHROEDER:

Q. At the time you asked him for his identification, was it your intention to give him a traffic ticket for a double parking violation? A. At that time I told him he was in violation. And during the time he was getting his identification card, that is when I observed the capsule.

67 Q. I didn't ask you that. You are not being responsive to my question. My question was, and I repeat, at the time you asked him for his identification, was it your intention to give him a traffic ticket for double parking? A. At that time I didn't know what I would probably charge him with, due to the fact that -- I knew he was double parked, and I told him that, and he was in violation. But I had to check his identification card to find out whether he had one, or whether he had a hacker's identification card or permit; and that is why I asked him for it.

Q. And then at the same time was it your intention to give him a ticket? A. If he didn't have a permit or hacker's identification card, yes.

Q. So you were going to give him a ticket, if he didn't have the proper identification? A. That is correct.

Q. But at this point you had no intention of giving him a ticket for double parking? A. No, not at the point I walked up to the car.

Q. How about at the point where you asked him for his ID card and registration and such? A. Well, during the process of him giving it to me, I observed other things. But prior to that --

Q. No. Before we get into the observing point, I want to know when

68 was it your intention to give him a traffic ticket. Now you don't give traffic tickets for seeing narcotics, do you? A. As I stated, if he hadn't produced a permit and identification card, as I asked him for.

Q. Does the carrying of a permit and identification card have anything to do with the violation of double parking? A. Would you repeat the question?

Q. Does the carrying of an identification card and registration, and the usual documents, if I may use that term, with driving a car, does that have anything to do with double parking? A. No, that hasn't.

Q. When did you intend to give him a ticket for double parking? A. At the time that I stated, if he hadn't had his permit and his registration card, I would have given him a ticket for double parking, plus the other things that I would have seen.

Q. Now let me understand you. If it turned out that Mr. Harrell did not have the proper identification card and the proper registration,

and what not, you were then going to give him a traffic ticket for double parking, along with a ticket for not having the proper credentials?

A. That is correct.

69 Q. Once again I direct your attention to December 13th when you testified, and ask you if this is your statement. If not, please state so for the record.

MR. HANTMAN: May we have the page reference?

MR. SCHROEDER: Oh, I am sorry -- page 6. I believe this was asked --

BY MR. SCHROEDER:

Q. This is from page 6, and I believe Mr. Hantman was asking the questions. Is that not correct, sir? Mr. Hantman asked you:

"Question: What was your purpose in asking the driver for his license identification?"

Your answer was:

"I identified myself. I was going to give him a ticket for double parking, after I blew the horn and he didn't move."

Do you recall making that statement? A. I don't recall whether I made that statement. But I do recall making the statement that I approached him and told him it was a violation, that he was double parked.

Q. And I am asking you, when did you intend to give him a ticket for double parking? A. I just stated.

THE COURT: When did it come to your mind, is another way of putting it.

70 THE WITNESS: When I observed him double parked, it came to my mind to give him a ticket, after I had got out and asked him for his identification.

BY MR. SCHROEDER:

Q. You were then going to give him a ticket for double parking?

A. Yes.

Q. That is all I wanted to know.

THE COURT: Plus the other things, --

THE WITNESS: Yes.

THE COURT: -- if they didn't pan out right?

THE WITNESS: That is correct.

BY MR. SCHROEDER:

Q. Did Mr. Harrell have the proper registration, identification? A. Yes, he produced them.

Q. Did you have your ticket book with you at that time? A. No, I didn't.

Q. How was it, then, that you were going to give him a ticket, when you didn't have your ticket book? A. I was going to take him to the office.

Q. In order for you to take him to the office, you would have to place him under arrest, would you not? A. That is correct.

71 Q. So, in order to take him to the office for a traffic violation, he would have to be under arrest at the time that you determined that he had violated the traffic regulations? A. Would you repeat your question, sir?

Q. In order for you to take him to the office for a traffic violation, you would have to arrest him; is that not correct? A. That is correct.

Q. Since you stated that you intended to give him a traffic ticket, at the time you asked him for his identification card and registration, you would then have had to place him under arrest to carry out your intentions? Is that not correct? A. That is right.

Q. Therefore it follows that he was placed under arrest at the time you asked to see his identification card and registration?

MR. HANTMAN: I object. Counsel is now testifying himself.

THE COURT: I sustain the objection.

MR. HANTMAN: If Your Honor please, counsel is inferring facts from the questions he is putting to the witness, without actually stating any questions to the witness.

THE COURT: I have sustained your objection.

MR. HANTMAN: Very well, Your Honor.

72 BY MR. SCHROEDER:

Q. When did you arrest the defendant? A. When I observed the capsule, I told him to get out of the cab, and he was under arrest. I stated to him then he was under arrest, when I placed my hands on him.

Q. You observed the capsule after you asked him for his identification card; is that not correct? A. Yes, I observed the capsule while he was getting the identification card.

* * * * *

73 Q. After you saw the capsule, did you tell the defendant to get out of the car immediately? A. Yes, I told him to get out.

Q. On which side of the car did he get out? A. He got out on the driver's side.

Q. He got out on the driver's side? A. That is correct.

Q. Did you proceed to then search him? A. I searched him shortly after that. But I had reached in the cab. When he got out, I got the capsule first. And in the meantime I saw this paper sticking out, the cigarette cellophane paper. I pulled it from between the seat, and then I searched him.

74 Q. Before you started the search of the taxicab, did you tell the defendant he was under arrest? A. I told him he was under arrest when I told him to get out of the cab, when I saw the capsule.

Q. It was then that you put forth the actual words, "You are now under arrest"? A. That is correct.

* * * * *

75 Q. Could the defendant have in any way at this time gotten back into the cab without your stopping him? A. I don't understand what you mean.

Q. You said the defendant was standing outside the cab on the driver's side, and you were reaching into the cab on the driver's side. Is that not correct? A. That is correct.

Q. Could the defendant have gotten back into the cab without your stopping him? A. No, he couldn't have.

Q. And you proceeded to search the cab and you found the cellophane package? A. Well, it wasn't an extensive search, because it was laying right there, sticking part the way out of the seat, in between the back of the seat and the bottom of the seat.

Q. The cellophane was? A. Yes.

Q. What precisely did you see sticking out of the seat? A. The top portion of the cellophane paper off of a cigarette package. And I just pulled the paper out and the capsules were in the paper.

* * * * *

83 Q. Once again, Officer, I will ask you if you testified at the Grand Jury. A. I did.

MR. SCHROEDER: Once again, Your Honor, I renew my motion to be permitted to examine the Grand Jury minutes.

84 THE COURT: The motion is denied.

MR. SCHROEDER: Then I would like to make a motion that the Court inspect the Grand Jury minutes in camera.

THE COURT: I deny that motion.

MR. SCHROEDER: I have no further questions.

* * * * *

(The jury is now in the box.)

85 DIRECT EXAMINATION (RESUMED)

BY MR. HANTMAN:

Q. Officer Hutcherson, at the time the Court excused the jury this morning, you were telling us about you and your partner pulling into the 1400 block of Belmont Street and observing General Cab No. 42 double parked in the street. What did you do at that moment, sir? A. I pulled up behind the cab and blew the horn twice.

Q. All right. And did you observe any response to your blowing the horn at that point, sir? A. The cab didn't move off.

Q. What if anything did you then do, sir? A. I then got out of the car and walked --

THE COURT: At that time when you blew the horn and he still didn't move off, was this man standing beside the car?

THE WITNESS: The other person was standing outside the cab.

THE COURT: On the --

THE WITNESS: On the passenger side.

THE COURT: Near the cab?

THE WITNESS: Near the cab, yes.

THE COURT: Do you know whether the door of the car was still open, or was it closed?

86 THE WITNESS: The door was closed?

THE COURT: And you got out of your car?

THE WITNESS: That is correct.

BY MR. HANTMAN:

Q. Was the individual who was standing at the side opposite the driver in the street or on the curb? A. He was still in the street, because there were cars parked along there, and he was standing in the street.

Q. Then you got out of your cruiser? A. I did.

Q. What if anything did you do? A. I walked up to the driver's side of the cab and asked him for his identification card as a hacker, and his driver's permit.

Q. You say you asked him for his -- you asked who, sir? A. The defendant Harrell.

Q. Reuben H. Harrell, the defendant in this case? A. That is correct.

Q. And what if anything did the defendant, Reuben H. Harrell, say or do when you asked him for his identification?

THE COURT: First, did you identify yourself?

THE WITNESS: I did; I identified myself when I walked up. I showed him my folder with my picture and identification on it, and asked him for his identification.

87 At this time I observed him shove something in the seat, between the seat, with his left hand.

BY MR. HANTMAN:

Q. Did you say anything to the defendant about his position in the street at that time? A. I told him that he was in violation, in that he was double parked.

Q. And did you see anything unusual on the seat, sir? A. During the course of him looking for his identification card, I did observe --

THE COURT: Looking where for it?

THE WITNESS: He looked in the glove compartment, and he reached under the seat, and he looked up over the visor.

I did see a capsule laying on the seat beside him.

BY MR. HANTMAN:

Q. What kind of a capsule was this? A. It was a No. 5 capsule.

Q. What is a No. 5 capsule? A. It is a much smaller capsule than the average size medicine capsule.

Q. Was this an empty capsule or a capsule with some material in it? A. It contained a white powder at the time I saw it.

Q. When you observed this small white capsule, No. 5 capsule,
88 containing a white powder, what if anything did you say or do?

THE COURT: Before you answer that question, tell us what the lighting conditions were. This is a little bit before nine, 8:50 you said, May 31st, which would mean daylight saving time, and I guess it would be dark by that time.

BY MR. HANTMAN:

Q. Was it dark at that time, Officer? A. It was dusk-dark.

THE COURT: How were you able, in other words, to see the capsule on the seat?

THE WITNESS: There are lights, Your Honor, in that block; and also the lights from his dashboard were also on.

BY MR. HANTMAN:

Q. And from the meters in the car? A. That is correct.

Q. Had you seen No. 5 capsules before in the course of your employment? A. I have.

Q. And you knew the use to which No. 5 capsules were generally put? A. I did.

Q. What use was that, sir? A. They are normally used in narcotics traffic here in the District of Columbia.

89 Q. When you observed this very small, minute No. 5 capsule, on the seat, was it to the left of the driver or to the right of the driver? A. It was to the right of the driver.

Q. And when you saw this capsule, what if anything did you say or do? A. I then told the defendant Harrell to get out of the cab and that he was under arrest for violation of the narcotics law.

Q. And what did you proceed to do then? A. I then reached into the cab where --

* * * * *

100 Q. Specifically what if anything did the defendant tell you with regard to his possession of that material at that time, sir?

MR. SCHROEDER: Objection. May counsel approach the bench, Your Honor?

THE COURT: Yes.

(At the Bench:)

MR. SCHROEDER: With regard to this question, there is a tendency of the witness to start out with the answer, "He told me he had a dishonorable discharge," and then he wrote to the Attorney General to take care of this matter. The only reason I am objecting is that I don't want the witness to bring out the dishonorable discharge.

MR. HANTMAN: If you will note, if Your Honor please, I asked the witness "specifically" what did the defendant say with regard to the possession of this material. And I have also cautioned the witness. So that I don't anticipate he will say anything about that.

THE COURT: If he does, I would have to declare a mistrial.

MR. HANTMAN: I am reasonably confident he is not going to.

MR. SCHROEDER: Thank you, Your Honor.

(In open Court:)

* * * * *

101 THE WITNESS: At police headquarters in the Narcotics Squad he stated he preferred not to tell me where he got the capsules from that was in that cab at that time; and he had reasons for not telling me at that time, he stated.

* * * * *

CROSS EXAMINATION

BY MR. SCHROEDER:

* * * * *

102 Q. Were you in the area of 14th and Belmont Street for any special reason other than just patrolling your area? A. As police work and as a narcotic agent, that was my reason for being in that area.

Q. You were patrolling, as a narcotic agent? A. That is correct.

Q. Had you at any time prior to this, during the same night, May 31st, been given a tip by any informer as to someone carrying or transporting narcotics in that neighborhood? A. Not this particular night, no.

Q. Were you looking for any specific person in this area on the night in question? A. No, not any particular person.

Q. Now as you were traveling down 14th Street, you turned into Belmont Avenue heading west toward 15th Street; is that not correct? A. That is correct.

Q. Now as you turned the corner onto Belmont Street, you stated you observed a taxicab double parked? A. I did.

Q. And outside of the parked taxicab you saw a man talking to the driver; is that not correct? A. I saw a man standing outside the cab,

103 seemingly talking.

Q. Seemingly talking to the driver.

You then stated that you pulled up behind the double parked cab and blew your horn twice? A. That is correct.

Q. Now when you blew your horn twice, was it a beep-beep, or was it a beep and a delay and then another beep? A. I blew the horn once and paused, and then blew it again.

Q. How long would you say you paused before you blew it again? A. Oh, five to ten seconds.

Q. After you blew your horn, what happened? A. I got out of the cruiser, after the cab didn't move.

Q. You got out of the cab from the passenger side? A. I got out of the cruiser from the driver's side.

Q. Pardon me -- from the driver's side. A. I got out of the cruiser from the driver's side, yes.

Q. Who else was in the cruiser with you? A. Officer Bonaparte was sitting in the front on the passenger side, and Officer Heath was in the back.

Q. While you got out of the cab on the driver's side, what did Officer Bonaparte do? A. He got out of the cruiser on the passenger
104 side and walked over to the person who was standing, who had walked away as I got out of the cruiser on the driver's side.

Q. Now, Officer, what was your intention of getting out of your cruiser and walking over to the taxicab? A. I went to check to see if the driver had a permit, a hacker's identification card, and why he was parked there.

Q. Was it or was it not your intention, upon leaving your police car, to also give the defendant, Reuben Harrell, a traffic ticket for double parking? A. I had in mind, if he didn't have the proper identification, to give him a traffic ticket, yes.

Q. Did you have your ticket book with you, Officer? A. No, I didn't.

Q. How then were you going to give him a traffic ticket for double parking? A. I was going to have to take him to the station.

Q. In other words, you were going to arrest him? A. I was.

Q. For double parking? A. If he didn't have his proper identification.

Q. I will ask you this, Officer: What connection does proper identification have to do with double parking an automobile? A. Proper identi-
105 cation -- I don't quite understand your question, sir.

Q. I am having a hard time understanding what connection there is in carrying proper identification and double parking an automobile. A. There is no connection that I can see, other than if he is double parked and under the wheel, he must have a permit; and I have seen him driving the cab prior to that.

Q. What happens if an individual has the proper identification and registration and is double parked?

MR. HANTMAN: I object, Your Honor. We are in the realm of conjecture, and I submit the witness should not be permitted to answer that.

THE COURT: I will overrule the objection and permit him to answer that question.

Do you understand the question?

MR. SCHROEDER: Do you want me to repeat the question?

THE WITNESS: Yes, please.

BY MR. SCHROEDER:

Q. What happens if a person has his proper identification and registration, according to the law, and is double parked? A. It all depends upon what his explanation is for being double parked, whether I give him a ticket, whether he would have been given a ticket or not.

106 Q. Did you ask Mr. Harrell why he was double parked when you approached his cab? A. I did, after I had asked him for his identification. But during the process of getting his identification, I had observed something else.

Q. I am asking you, did you specifically ask Mr. Harrell why he was double parked, at any time? A. Not before I had arrested him, no.

Q. Thank you. In other words, you arrested him first? A. After I had observed --

Q. I am aware of that, that you had arrested him first before you asked him why he was double parked. Is that not your statement?

THE COURT: Did you ever ask him why he was double parked?

THE WITNESS: I didn't ask him at the time why he was double parked. I asked him for his identification. And during the time he was giving me his identification, I observed the capsule.

BY MR. SCHROEDER:

Q. Now, Officer, I assume when you first started with the police force you were given training of some sort. Is that not correct? A. That is correct.

107 Q. Does not part of this training include studying the various D.C. regulations, or becoming familiar with the various D.C. regulations, especially traffic so you can enforce the regulations? A. It does.

Q. Are you aware of the D.C. regulations, as an Officer? A. Yes, I am aware of them.

Q. Is it not a fact that under the District of Columbia traffic motor vehicle regulations that a passenger vehicle can double park for the purpose of loading and unloading of a passenger? A. It can double park for the purpose of loading and unloading a passenger.

Q. Now getting back in regard to your assignment as a narcotic agent, did you make out a daily narcotic report after this incident? A. There was a report made of the incident, yes.

Q. Was it filed in your office? A. There is a daily report made for every day, and it is filed.

Q. Did you make out a report with regard to this specific incident? A. I have to make a report.

Q. Do you have that report with you now? A. I don't have it with me, no.

108 MR. SCHROEDER: I respectfully request that the report be turned over to me so that I can examine it, Your Honor. It is a Jencks type statement.

* * * * *

111 THE COURT: Ladies and gentlemen of the jury, I will take a brief recess. And if this report is available I will give the lawyers an opportunity to look at it. It may or may not help us in this case. I don't know. But I will give them a chance to see it. So if you will return to the jury room for just a few minutes, and remember not to discuss the case.

(Following a brief recess:)

THE COURT: Are we squared away, or do you want to come to the bench?

MR. SCHROEDER: May we approach the Bench?

(At the Bench:)

MR. SCHROEDER: I have seen one page from the report, namely, page 2, nothing more. At the bottom of the page there is no signature or no name -- I assume a composite of the Officer's testimony.

THE COURT: What is the first page?

MR. HANTMAN: Just a cover page. The Officer tells me, Your

112 Honor, the report is the page I have shown to counsel. It is the report he has testified to, which was made jointly by him and Officer Bonaparte. I think this is what counsel asked for and this is what counsel has been shown.

THE COURT: Do you want to use it?

MR. SCHROEDER: No.

THE COURT: You see, those things are so routine they don't help anybody later, because it is the gist of the events. They rarely go into detail.

MR. HANTMAN: That is right.

THE COURT: Very well.

(In open Court:)

BY MR. SCHROEDER:

Q. Now, Officer Hutcherson, you testified that when you continued to search the taxicab you saw the cellophane sticking out between the seat and the cushion; is that not correct? A. Yes, I saw it.

Q. You did not see the cellophane package lying on the seat itself, did you? A. No, I don't recall seeing it lying on the seat, no. The paper was sticking out, the top portion of the cellophane paper.

THE COURT: Between the --

THE WITNESS: The cushion.

113 THE COURT: Between the cushion and the back rest?

THE WITNESS: Yes.

* * * * *

115 BY MR. SCHROEDER:

Q. Officer, will you tell the ladies and gentlemen of the jury what this is, and if you yourself made it or in conjunction with Officer Bonaparte. A. This is a case report of the arrest of Reuben Harrell in which Officer Bonaparte and I compared our notes from what we have, and Officer Bonaparte typed it up.

Q. Is this a true statement of what you reported to Officer Bonaparte when he typed it?

THE COURT: Have you read it?

THE WITNESS: I would have to read the whole thing over again.

BY MR. SCHROEDER:

Q. Well, refresh your memory (handing report). A. (After reading) I see there is one statement in here which could be a typographical error on Officer Bonaparte's part. He states that I looked

116 into the cab and observed the cigarette package on the seat. But it wasn't on the seat. That is the only statement in there.

Q. That is the statement I was concerned with. So it could be a typographical error? A. Yes.

Q. This is not what you actually saw? A. No.

* * * * *

119 JOHN HURST BONAPARTE

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HANTMAN:

* * * * *

120 Q. And how long have you been on the Narcotics Squad of that department? A. About five and a half years.

* * * * *

Q. Officer Bonaparte, directing your attention to May 31, 1961, were you on duty with Officer Hutcherson on that date? A. Yes, sir, I was.

Q. About eight-fifty that evening, do you recall where you were? A. Yes, sir, I do.

Q. And where was that? A. We were in the 1400 block of Belmont Street, Northwest.

121 Q. That is here in the District of Columbia? A. Yes, sir, it is.

Q. What kind of a vehicle were you in? A. We were in a Metropolitan Police unmarked cruiser.

Q. Did you notice anything unusual when you entered the 1400 block of Belmont Street, Northwest? A. We noticed a cab double parked about middleways of the block.

Q. What if anything did you or Officer Hutcherson do when you made this observation? A. Officer Hutcherson pulled behind the cab and blew his horn a couple of times. The cab continued to stay parked.

Q. When you pulled up behind the cab, with Officer Hutcherson, was there anyone in the cab that you could observe? A. There was someone sitting under the driver's side, and there was a person standing outside of the cab on the passenger side.

Q. With respect to the person that was standing outside on the passenger side, was the door of the cab open or shut? A. The door was closed.

Q. Could you observe any transaction between the passenger and the driver? A. No, sir, I didn't.

Q. Did you later learn who the driver was? A. Yes, sir, I did.

122 Q. Who was that? A. Reuben Harrell.

Q. The defendant in the case? A. Yes, sir.

Q. When the horn was blown by Officer Hutcherson a few times and he got no response, what if anything did you observe Officer Hutcherson do? A. Officer Hutcherson got out of the cruiser on the operator's side of the cruiser, and I got out on the passenger side.

Q. And what was your purpose in getting out on the passenger side? A. The subject who had been standing alongside of the cab had walked over to the sidewalk, as Officer Hutcherson got out. I got out to talk to this subject.

Q. And what was his name? A. His name was Otey.

Q. And while you were talking to the individual who had been on the passenger side, did you hear any remark made to you by Officer Hutcherson in the presence of this defendant? A. Yes, sir. Officer Hutcherson called out that he had found a capsule of suspected heroin on the front seat of the cab.

* * * * *

123 Q. When you came over to where Officer Hutcherson was standing with the defendant, where were they at that time, if you recall?

A. I believe they were standing near the front of the operator's side of the car.

Q. And did you see anything unusual in the possession of Officer Hutcherson at that time? A. Officer Hutcherson had one loose capsule in his hand, and he had other capsules in a small, wrapped in a cellophane

124 piece of paper.

Q. What size capsules were these? Do you recall? A. They were No. 5 gelatin capsules.

Q. And what is a No. 5 gelatin capsule? A. It is a small gelatin capsule that is usually used in this area to cap heroin.

Q. Were these capsules full or empty? A. They were full.

Q. They contained what that you could see? A. They contained a white powder.

* * * * *

128 CROSS EXAMINATION

BY MR. SCHROEDER:

Q. Officer Bonaparte, on the night of May 31st, between eight and nine p.m., you testified you were cruising in the area of Belmont and 14th Street, Northwest;is that correct? A. Yes, sir.

Q. And were you there on any particular or specified mission?

129 A. No, sir.

Q. You were just cruising in the area? A. Yes, sir.

Q. Had you been given any sort of tip by an informer that narcotics were being transported in that area? A. Not particularly, I don't believe.

Q. On the night of May 31st were you or were you not given a tip by an informer that narcotics were being transported in the area?

A. I don't remember being given a tip.

Q. While you were in the area, were you looking for any particular person? A. No, sir.

Q. Were you looking for any particular act? A. No, sir.

Q. As you turned the corner off of 14th onto Belmont Street, heading west toward 15th Street, you observed the taxicab double parked; is that not correct? A. Yes, sir.

Q. How long would you say it took you to get from the corner of 14th and Belmont to where the taxicab was situated? A. In my opinion I feel it took a matter of seconds, maybe a minute.

Q. A matter of seconds.

When the unmarked police car pulled up behind the taxicab, you

130 testified your horn was honked by Officer Hutcherson, that he honked it twice. Now when he honked the horn, was it a beep and than a wait and then another beep, or was it a beep beep? A. It was a beep beep; and then he waited, paused for a short while; and then he blew again a beep beep.

Q. Then he honked the horn four times?

THE COURT: I guess that is a matter of what do you mean by honking a horn.

BY MR. SCHROEDER:

Q. He made noise with a horn four times, or twice, a double beep beep? A. A double beep beep, I would --

Q. Twice? A. Yes.

Q. Which would create four sounds? A. Yes, sir, I imagine.

Q. And then after beeping the horn, Officer Hutcherson proceeded to get out on the driver's side, and you proceeded to get out on the passenger side; is that not correct? A. That is correct.

Q. What was your intention for getting out of the car at that time? A. My intention for getting out?

Q. Yes, sir. A. To speak to Mr. Otey.

131 Q. With regard to what? A. Officer Hutcherson was going to talk to the passenger about the traffic violation that he was committing. I was going to --

THE COURT: You mean the driver?

THE WITNESS: The driver. I was going to speak to Mr. Otey, because where there is a traffic violation and there are witnesses, we get the names and the addresses of the witnesses.

BY MR. SCHROEDER:

Q. So that am I correct in saying that the primary purpose of you two gentlemen in leaving your car and approaching the taxicab was concerning the matter of a traffic violation, am I not? A. Yes.

* * * * *

Q. Did Officer Hutcherson say anything to you as the two of you were about to get out of the car, with regard to this traffic violation?

132 A. I don't remember whether there was any discussion or not about the traffic violation. We both knew that he was in violation.

Q. Did you have your traffic ticket book with you? A. No, sir; we don't carry them with us.

Q. You don't carry traffic books? A. Not with us, no, sir.

Q. When you went over to talk to the so-called witness, Mr. Otey, it was your intention of getting his name and address? A. Name, address, place of employment, and telephone numbers for all those places.

THE COURT: At the time of this occurrence, were you and Hutcherson, or you -- and you don't know as to him -- more or less suspicious of the situation?

THE WITNESS: No, sir. At that time I assumed that Officer Hutcherson was going to arrest him for the traffic violation.

BY MR. SCHROEDER:

Q. You stated, Officer, that you went over to ask Mr. Otey his name, his address, his employment, and his telephone number. This was for the purpose of using him as a witness? A. We have the names of witnesses when we can.

Q. Did he answer your questions freely? A. Yes, sir.

* * * * *

138 Q. And I also assume, Officer, when you first started with the Force you were given an extensive training as a police officer. A. I am not sure I understand. I was given training. I don't know how extensive it was.

Q. Then you were given the ordinary police training that is given every rookie before he is put out on the street; is that not correct?

A. I did go to the training school, yes, sir.

Q. Isn't it a fact that part of this training involves a schooling of the officers, the police, with regard to the various District of Columbia traffic regulations and motor vehicle regulations? A. Yes.

Q. Isn't it also a fact that under such traffic regulations or motor vehicle regulations a vehicle can double park to load or unload passengers?

A. Yes.

* * * * *

141 Washington, D.C.
Wednesday, January 24, 1962

* * * * *

142 MACEO HUTCHERSON

called as a rebuttal witness by the Government, having been previously sworn, resumed the witness stand and further testified as follows:

DIRECT EXAMINATION

BY MR. HANTMAN:

* * * * *

144 Q. Did you ever say to the defendant, "Hurry up," or did you ever
145 rush him in any way? A. No, we never did. In fact, after we had finished the processing, we had some hot chocolate and candy bars.

Q. Who is "we?" A. Officer Bonaparte, Officer Heath, myself and the defendant also drank a cup.

Q. You all had hot chocolate and candy? A. That's correct.

Q. Did you have any discussions thereafter? A. Yes. He was discussing the matter of how he got his dishonorable discharge, and that he was trying to do something about it, and he had already wrote to the Attorney General, and he was awaiting an answer.

MR. HANTMAN: I have no further questions.

* * * * *

151 JOSEPH W. HEATH

called as a rebuttal witness by the Government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HANTMAN:

* * * * *

152 Q. Officer Heath, directing your attention to the evening of May 31, 1961, were you in an unmarked vehicle about 8:50 that evening with Officers Hutcherson and Bonaparte? A. Yes, sir; I was.

Q. Did there come a time on that date at or about that time when you found yourself at 1429 Belmont Street, Northwest, here in the District of Columbia? A. Yes, sir.

Q. Were you present when the car pulled up behind this vehicle driven by the defendant, Reuben H. Harrell? A. Yes, sir; I was.

Q. Did there come a time when you observed the defendant, Reuben Harrell, get out of the car? A. Yes, sir.

Q. Which side of the vehicle did he get out? A. The left side; the driver's side.

153 Q. Where was Officer Hutcherson? A. He was standing at the door, near the defendant.

Q. Now, at any time, while that unmarked vehicle was behind the cab that was right in front of you, did you ever get out of the cab? A. No, sir; I didn't. I didn't leave the cruiser.

Q. Did you call a police vehicle to transport the defendant to headquarters? A. No, sir; I did not.

Q. How was that accomplished? A. Officer Hutcherson came back to the cruiser and called for it.

* * * * *

[Filed January 25, 1962]

CLERK'S CERTIFICATE- VERDICT

On this 25th day of January, 1962, came again the parties aforesaid, in manner as aforesaid and the same jury as aforesaid in this cause, the hearing of which was respited yesterday; whereupon after hearing the instructions of the Court the alternate juror is discharged and the jury retires to deliberate; thereupon the jury returns into Court and upon their oath say that the defendant is guilty; whereupon each and every member thereof is asked if that is his or her verdict and each and every member thereof says that the defendant is guilty.

The case is referred to the Probation Officer of the Court and the defendant is remanded to the District of Columbia Jail.

By direction of

Henry A. Schweinhaut
Presiding Judge
Criminal Court # 5

* * *

* * *

[Filed March 12, 1962]

JUDGMENT AND COMMITMENT

On this 9th day of March, 1962 came the attorney for the government and the defendant appeared in person and by counsel, H. Kenneth Schroeder, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Violation of Section 4704(a), Title 26 U.S. Code and Violation of Section 174, Title 21 U.S. Code as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twenty (20) Months to Five (5) Years on Count 1; Five (5) Years on Count 2; Said sentences by the counts to run concurrently.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ H.A. Schweinhaut
United States District Judge

[Filed September 10, 1962]

Before: Washington, Burger and Wright, Circuit Judges, in Chambers.

ORDER

On consideration of petitioner's petition for leave to prosecute an appeal without prepayment of costs, of petitioner's memoranda in support thereof, of respondent's memoranda in opposition thereto, and of petitioner's replies, it is

ORDERED by the court that the petitioner be, and he is hereby, allowed to prosecute an appeal without prepayment of costs, and that the stenographic transcript of the testimony given by Officers Hutcherson, Bonaparte, and Heath, at the second trial herein in the District Court shall be furnished to petitioner at the expense of the United States, and the Clerk of the District Court is hereby directed to certify the original record on appeal to this court promptly within 40 days from the date hereof.

Per Curiam.

Dated: September 10, 1962

A true copy:

Test: JOSEPH W. STEWART, Clerk,
United States Court of Appeals for
the District of Columbia Circuit.

By:
Deputy Clerk